i n d e x

	PAGE NO.
Caption	1
Agreed statement of appeal pursuant to Rule 76 of the Federal Rules of Civil Procedure and Rule 39 (b) (1) of the Federal rules of Criminal Procedure	2
Indictment	10
Motion of defendant to dismiss	13
Motion for directed verdict	16
Defendant's requested issue No. 1	21
Defendant's requested Issue No. 2	21
Defendant's requested Issue No. 3	22
Defendant's requested Issue No. 4	22
Judgment and commitment	23
Motion for bail	25
Order overruling motion for bail	26
Notice of appeal	26
Bond	27
Transcript of testimony	29
Eugene Spivak	29
Robert E. Keating	45
Arthur Grollman	53
Thomas Guy Brown	79
Lawrence Speegle	157
Court's Charge to the Jury	167
Objection to Court's Charge	175
Clerk's Certificate	181

...oOo...

C A P T I O N

BE IT REMEMBERED that at a term of the United States District Court for the Northern District of Texas, Amarillo Division, at Amarillo, Texas, begun and held at Amarillo, Texas on January 7, 1957, the Honorable Joseph B. Dooley, United States District Judge, Presiding, the following proceedings were had, and the following cause came on for trial and was tried:

No. 2620 CRIMINAL

UNITED STATES OF AMERICA

VS.

THOMAS GUY BROWN

****

AGREED STATEMENT OF APPEAL PURSUANT TO RULE 76 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND RULE 39 (b) (1) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

(Number and Title omitted) (Filed July 1, 1957)

It is agreed that the statement of the case hereinafter set out into which shall be incorporated so as to be made a part thereof the following items:

Indictment

Motion to Dismiss

Motion for Acquittal

Defendant's Requested Instructions

Court's Charge

Objections to Charge

Judgment of Trial Court

Motion for Bail

Order Overruling Motion for Bail

Notice of Appeal

Appeal Bond

and a transcript of the testimony given by the witness Eugene S. Spivak on direct examintion, the witness Robert E. Keating on direct examination, the witness Arthur Grollman on direct examination, the defendant Thomas Guy Brown on direct examination and cross-examination,and the witness Lawrence Speegle on direct examination, shall constitute the record of this case on appeal.

STATEMENT OF THE CASE

Thomas Guy Brown is a practicing physician in the City of Dumas, Texas, Dumas, Texas, is within the Amarillo Division

of the Northern District of Texas. He is and has been licensed by the Texas Board of Medical Examiners in accordance with the requirements of the Texas Statutes and he is a practitioner licensed by law to administer drugs. A United States grand jury in the Northern District of Texas returned an indictment against Thomas Guy Brown in three counts charging him with violating those portions of the Federal Food, Drug, and Cosmetic Act (21 U.S.C., 301 et seq.) which prohibit the dispensing of certain dangerous drugs without the prescription of a licensed physician. Defendant's motion to dismiss the indictment for failure to charge an offense was overruled, and the case went to trial.

At the trial of the case, the Government witnesses testified to the following facts:

1. On March 10, 1956, defendant sold Eugene Spivak a sealed bottle containing one thousand five milligram tablets of the drug dextroamphetamine hydrochloride for the price of ten dollars. This transaction took place under the following circumstances:

(a) The defendant made no physical examination of any sort of Spivak.

(b) Spivak had previously represented to the defendant that his employment was that of a truck driver.

(c) Defendant did not tell Spivak how to use the drug.

(d) The defendant executed no written order

or other record relating to the sale of the drug to Spivak.

2. On March 22, 1956, defendant sold Eugene Spivak a sealed bottle of one thousand ten milligram tablets of the drug dextro-amphetamine sulphate for the price of fifteen dollars. This transaction took place under the following circumstances:

(a) The defendant made no physical examination of any sort of Spivak.

(b) Spivak had previously represented to the defendant that his employment was that of a truck driver.

(c) The defendant did not tell Spivak how to use the drug.

(d) The defendant executed no written order or other record relating to the sale of the drug to Spivak.

3. On March 23, 1956, defendant sold Robert Keating, in the presence of Eugene Spivak, a sealed bottle containing one thousand five milligram tablets of the drug dextro-amphetamine hydrochloride for the price of ten dollars. The transaction took place under the following circumstances:

(a) Defendant stated that he did not want to get into trouble by selling amphetamine drugs to Spivak and Keating and that he only sold them to his friends.

(b) Defendant did not give Keating a

physical examination of any sort.

(c) Defendant did not tell Keating how or in what manner to take the drugs.

(d) The defendant executed no written order or other record relating to the sale of the drugs to Keating.

(e) Spivak introduced Keating to the defendant as another truck driver.

4. Insofar as the record shows, medical practitioners do not prescribe more than ninety tablets of amphetamine drugs at one time for use by a patient in the treatment of those diseases and conditions for which such drugs are useful. One expert witness characterized the sale of one thousand amphetamine tablets at one time as "Wholesale drug business".

5. The drugs involved, dextro-amphetamine hydrochloride and dextro-amphetamine sulphate, are included in those categories of drugs which must, under the statutes, be dispensed only on prescription, in that they are drugs which, because of their "* Capacity for harmful effects, or the method of (their) use, or the collateral measures necessary to (their) use, (are) not safe for use except under the supervision of a practitioner licensed by law to administer such drug(s)."

The unsupervised use of these drugs may result in the following harmful effects:

(a) The raising of blood pressure to a point where a blood vessel might break.

(b) An adverse effect on the heart.

(c) Overstimulation of the nervous system and brain with the blunting of the intellectual capacity and possible convulsion.

(d) Death.

(e) They may cause hallucinations.

(f) Persons taking amphetamine drugs may acquire an artificial courage which causes them to perform acts which they otherwise would not.

(g) Persons taking amphetamine drugs feel a need to take sedative drugs in what becomes a "vicious cycle".

(h) The use of amphetamine drugs by truck drivers causes them to over-extend themselves and forego rest, thereby losing control over their nervous reactions.

6. In order to prevent the occurrence of the adverse effects described in Paragraph 5 above, the amphetamine drugs should on ly be used under the supervision of a physician. Such supervision consists of the performance of checks on the patient's physical condition, the taking of the patient's medical history, and varying the amount of drugs prescribed in accordance with the patient's needs.

7. The drugs sold by the defendant to Eugene Spivak on March 10, 1956, and to Robert Keating on March 23, 1956, were positively identified by chemical analysis and

by microscopic examination as dextro-amphetamine hydrochloride. The drugs sold by the defendant to Eugene Spivak on March 22, 1956, were positively identified by chemical analysis and by microscopic examination as being dextro-amphetamine sulphate.

8. The drugs involved, at the time that they were dispensed by the defendant to Eugene Spivak on March 10, 1956 and March 22, 1956, and to Robert Keating on March 23, 1956, as hereinabove set out, were all held for sale by the defendant after shipment in interstate commence from the State of Pennsylvania into the State of Texas.

9. The hereinabove described acts of the defendant Thomas Guy Brown in dispensing the drugs to Eugene Spivak on March 10, 1956 and March 22, 1956, and to Robert Keating on March 23, 1956, took place within the Amarillo Division of the Northern District of the State of Texas.

The defendant testified that he has been a licensed practitioner of medicine in Dumas, Texas, since 1930; that he made an examination by eye of Eugene Spivak before selling him any drugs; that he did not sell or dispense the drugs to Spivak and Keating as set out in the indictment; that he has used dextro-amphetamine sulphate tablets daily since 1943; that he had never sold or dispensed more than five hundred tablets of such drugs at any one time; and that he had never known of any adverse effect resulting from the taking of such drugs.

In rebuttal, the Government presented testimony that the defendant had, on occasions other than those charged in

the indictment, dispensed such tablets in one thousand tablet quantities under circumstances which, to the defendant's knowledge, resulted in the hospitalization of the person to whom the same were dispensed.

The defendant's motion for acquittal at the close of government's case was overruled. It was re-urged at the close of all testimony and was overruled. The defendant's requested instructions were all overruled. The defendant's objections to the court's charge were overruled. The jury returned a verdict of guilty on all three counts of the indictment. The verdict was returned on February 13, 1957, and sentence was imposed the following day. On February 15, 1957, defendant filed a motion for bail after sentence, which was overruled by the court the same day, not for lack of merit, but because the court was of the opinion that the Federal Rules of Criminal Procedure do not give the trial court the power to admit a defendant to bail after sentence and before filing notice of appeal. A short time later, on February 15, 1957, defendant filed notice of appeal and made bond pending appeal, and is now at liberty upon such bond.

It is expressly stipulated that all instruments and other matters mentioned in the preface to this statement of the case, including the designated portions of the evidence introduced at the trial of the case, are hereby fully incorporated herein and made a part hereof.

The defendant in his appeal relies solely and only upon the following points, to-wit:

1. The Pure Food and Drug Act does not apply to the act of dispensing drugs by a licensed physician.

2. The provisions of the Pure Food and Drug Act apply only to a person who, under the state law, does not have authority to practice medicine and prescribe drugs.

3. The trial court erroneously charged the jury that a licensed practitioner was not exempt from the Pure Food and Drug Act provisions.

4. The trial court erred in its ruling that it had no power to admit the defendant to bail after sentence and before filing notice of appeal.

This agreed statement of the case is made and entered into at the request, instance and motion of defendant, the consent of the Government thereto being based upon defendant's statement that the only errors complained of or in any way relied upon for reversal are those enumerated above, and that a substantial savings in money will result to the defendant if an agreed statement be entered into in lieu of a printing in full of the record.

Under the provisions of Rule 39 (b) (1) of the Federal Rules of Criminal Procedure and Rule 76 of the Federal Rules of Civil Procedure the parties hereto, through their respective counsel, hereby agree that the foregoing statement of the case, together with the items specifically incorporated therein by reference, contains those facts which they consider to be essential to a decision of the question involved by the Court of Appeals.

s/ Heard L. Floore
UNITED STATES ATTORNEY

s/ Ben Monning, Jr.
ATTORNEY FOR DEFENDANT

The foregoing statement is hereby approved this 25th day of June, 1957.

s/ Jos . B. Dooley
UNITED STATES DISTRICT JUDGE

...ooOoo...

INDICTMENT

(Number and Title Omitted)

The Grand Jury charges:

That prior to March 10, 1956, a number of dextro-amphetamine hydrochloride tablets were shipped in interstate commerce into the State of Texas in a bottle labeled in part:

Caution: Federal law prohibits dispensing without prescription.

That thereafter, on or about March 10, 1956, and while a number of tablets of said drug in said bottle were being held for sale after shipment in interstate commerce, as aforesaid, at 411 Dumas Avenue, Dumas, Texas, THOMAS GUY BROWN, hereinafter called defendant, did, at Dumas, Texas, within the Amarillo Division of the Northern District of Texas, cause said tablets of said drug in said bottle to be dispensed to one Eugene Spivak without a prescription therefor from a practitioner licensed by law to administer said drug;

That said act of causing the dispensing of said drug

as aforesaid was an act caused to be done by said defendant contrary to the provisions of 21 U.S.C. 353 (b)(1), which resulted in said drug in said bottle being misbranded while held for sale, in violation of Title 21, United States Code, Section 331 (k).

SECOND COURT

The Grand Jury further charges:

That prior to March 22, 1956, a number of dextro-amphetamine sulfate tablets were shipped in interstate commerce into the State of Texas in a bottle labeled in part:

Caution: Federal law prohibits dispensing without a prescription.

That thereafter, on or about March 22, 1956, and while a number of tablets of said drug in said bottle were being held for sale after shipment in interestate commerce, as aforesaid, at 411 Dumas Avenue, Dumas, Texas, THOMAS GUY BROWN, hereinafter called defendant, did, at Dumas, Texas, within the Amarillo Division of the Northern District of Texas, cause said tablets of said drug in said bottle to be dispensed to one Eugene Spivak without a prescription therefor from a practitioner licensed by law to administer said drug.

That said act of causing the dispensing of said drug as aforesaid was an act caused to be done by said defendant contrary to the provisions of 21 U.S.C. 353 (b)(1), which resulted in said drug in said bottle being misbranded while held for sale, in violation of Title 21, United States Code, Section 331 (k).

THIRD COUNT

The Grand Jury further charges;

That prior to March 23, 1956, a number of dextro-amphetamine hydrochloride tablets were shipped in interstate commerce into the State of Texas in a bottle labeled in part:

Caution: Federal law prohibits dispensing without prescription.

That thereafter, on or about March 23, 1956, and while a number of tablets of said drug in said bottle were being held for sale after shipment in interstate commerce, as aforesaid, as 411 Dumas Avenue, Dumas, Texas, THOMAS GUY BROWN, hereinafter called defendant, did, at Dumas, Texas, within the Amarillo Division of the Northern District of Texas, cause said tablets of said drug in said bottle to be dispensed to one Robert E. Keating without a prescription therefor from a practitioner licensed by law to administer said drug;

That said act of causing the dispensing of said drug as aforesaid was an act caused to be done by said defendant contrary to the provisions of 21 U.S.C. 353 (b)(1), which resulted in said drug in said bottle being misbranded while held for sale, in violation of Title 21, United States Code, Section 331 (k).

A TRUE BILL:

/s/ Ralph E. Randel
Foreman

/s/ Heard L. Floore
United States Attorney

/s/ Cavett S. Binion
Assistant United States Attorney

...ooOoo...

MOTION TO DISMISS

(Number and Title Omitted)

TO SAID HONORABLE COURT:

COMES NOW the defendant in the above entitled and numbered cause, Thomas Guy Brown, and moves the Court to dismiss the indictment herein for the following reasons, to-wit:

I.

That although said indictment carries three separate counts, the charging part of each count is identical and the law applicable in each count is the same.

2.

That the defendant is charged with violating the law under Title 21, Section 331 (k), U.S.C.A. and Title 21, Section 353, Paragraph (b) (1), U.S.C.A.

3.

That the government knew at the time said indictment was returned that the defendant, Thomas Guy Brown, was at the time of the alleged offense and is at the time of filing this motion to dismiss a legally licensed doctor of medicine with the right and privilege of practicing as a doctor of medicine in the State of Texas.

4.

That title 21, Paragraph 331 (k) of U.S.C.A. provides the following:

"The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, devise, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

5.

That Title 21, Section 321, Paragraph (n) provides the following:

"If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination therein, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual."

6.

That Title 21, Section 353, (b) (1) provides the following:

"A drug intended for use by man which ----

(C) is limited by an effective application under section 355 of this title to use under the professional supervision of a practitioner licensed by law to administer such drug shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale. "

7.

It is the contention of the defendant herein that dextro-amphetamine hydrochloride tablets and dextro-amphetamine sulphate tablets can be and are authorised to be dispensed by a licensed practitioner of medicine with or without a prescription and may be dispensed by an oral directive or a written directive to a pharmacist, and if so done, then Title 21, Section 353, Paragraph C set out the limitations upon the pharmacist.

8.

This indictment is in no way based upon Section 2 of

Article 6287 of the compiled statutes, nor has the Harrison Narcotic Act and the restrictions therein been made applicable but that the dicta in the cases of U.S. v. 22 Devices, more or less, Halox Therapeutic Generators, 98 Fed. Sup. 914, and Archanbault v. U.S., 224 Fed. (2) 925, is applicable.

WHEREFORE, under Rule 12, Paragraph 2 of the Federal Rules of Criminal Procedure, the defendant moves the Court to take cognizance of the professional status of the defendant in support of this motion and that upon hearing that each count of said indictment be dismissed and that the defendant be discharged.

MONNING AND MONNING
1016 Fisk Building
Amarillo, Texas

s/ Ben Monning, Jr.
Of Counsel

McCARTHY, ROSE & HAYNES
715 Fisk Building
Amarillo, Texas

s/ George S. McCarthy
Of Counsel

Attorneys for Defendant

...ooOoo...

MOTION FOR DIRECTED VERDICT

(Number and Title Omitted.)

TO SAID HONORABLE COURT:

COMES NOW Thomas Guy Brown, defendant in the above entitled and numbered cause, and moves the Court for a directed verdict of not guilty for the following reasons, to-wit:

I.

That under all the testimony introduced by the government, the defendant as a practicing physician is not chargeable under Title 21, Section 331 (k), U.S.C.A. nor Title 21, Section 353 (b)(1), U. S. C. A.

2.

There have been no reported cases wherein a licensed doctor of medicine has been tried under the above provisions. The history of this legislation is found under U. S. Congressional and Administrative Service, 82nd Congress, First Session, beginning on Page 2454 and continuing through Page 2464. The purpose of the Act was to control the dispensing of prescription and over-the-counter drugs, and "It has a two-fold objective: (1) to protect the public from abuses in the sale of potent prescription drugs; and (2) to relieve retail pharmacists and the public from burdensome and unnecessary restrictions on the dispensing of drugs that are safe for use without the supervision of a physician. The committee believes that the bill, as amended, will serve to eliminate much confusion and dissatisfaction caused by ambiguities in the present provisions of the act, and will benefit drug manufacturers, retail druggists, medical practitioners, and the public." (Page 2454)

Further:

"There are three classes of drugs covered by the statutory definition. The first includes the habit-forming drugs subject to section 502 (d) of the

present statute. These are such drugs as the barbiturates. The third class includes all new drugs restricted to prescription sale by effective new-drug applications under section 505 of the present statute. There is no controversy whatever about these two classes. The second class includes any drug which 'because of its toxicit or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, if not safe for use except under the supervision of a practitioner licensed by law to administer such drugs.'" (Page 2456)

" All drugs covered by the three classifications of prescription drugs must bear a label containing the statement 'Federal law prohibits dispensing without prescription.' THIS GIVES THE RETAIL DRUGGIST CLEAR NOTICE THAT HE WILL BE IN VIOLATION OF THE FEDERAL FOOD, DRUG, AND COSMETIC ACT IF HE DISPENSES ANY DRUG SO LABELED WITHOUT A PRESCRIPTION." (Emphasis ours) (Page 2457)

"This bill also specifies what information must be contained upon the label of the package dispensed to the patient. That label must contain the name and address of the dispenser, the serial number and date of the prescription or of its filling, the name of the prescriber, and, if stated in the prescription, the name of the patient, and the

directions for use and cautionary statements, if any, contained in the prescription." (Pages 2457 to 2458)

Further in the second paragraph on Page 2462, we take the following quotation:

"Also, as pointed out elsewhere, with respect to other habit forming drugs, oral prescriptions and refills are limited to situations in which the pharmacist obtains satisfactory evidence, on the basis of consultation with a licensed practitioner or otherwise, that the prescription or refill has been expressly authorised by such practitioner. A violation of the prescription requirements of paragraph (1) of the new subsection (b) is, under the provisions of this paragraph, deemed to be an act which results in the drug being misbranded while held for sale."

(Page 2462)

"Amendment (3) was proposed to emphasise the fact that the responsibility for preparing adequate directions for use and appropriate warnings against misuse in the labeling of drugs that may be sold without a prescription is upon the manufacturer and not the retail druggist. It does nothing more than free the retail druggist of responsibility for supplementing the labeling of some manufacturers' drugs to give the public adequate directions for use

and warnings against misuse. The druggist could rely in good faith upon the manufacturers' labeling for compliance with these requirements of the existing law. The amendment offers the druggist no protection against violations which arise if he sells a dangerous drug covered by paragraph (1) of the bill without meeting the prescription requirements." (Page 2460)

3.

If it were the intent of the Congress to require all prescription drugs to be dispensed by a pharmacist, the Act would certainly have so stated.

4.

If a prosecution can be instituted under the indictment as drawn in this case, then we must read into the law something that is not there and hold that a practicing physician cannot dispense drugs directly to a patient without a prescription, either written or oral. It is the contention of the defendant that this Act was intended solely for the purpose of protecting the public from the dispensing of manufactured drugs directly or through a pharmacist if they should fall in any of the three categories set up in the act.

WHEREFORE, PREMISES CONSIDERED, defendant moves the Court that a directed verdict be ordered and that the defendant be discharged on each count of said indictment.

MONNING AND MONNING
1016 Fisk Building
Amarillo, Texas

McCARTHY, ROSE & HAYNES
715 Fisk Building
Amarillo, Texas

/s/ George S. McCarthy
Of Counsel

Attorneys for Defendant

...ooOoo...

DEFENDANT'S REQUESTED ISSUE NO. 1

Filed: February 13, 1957

You are instructed that before you can find the defendant guilty you must find beyond a reasonable doubt that he knew that the dispensing of drugs by a physician was unlawful and he intended to violate that law.

REFUSED.

/s/ Jos. B. Dooley
United States District Judge

...ooOoo...

DEFENDANT'S REQUESTED ISSUE NO. 2

You are instructed that a licensed physician may lawfully administer or dispense toxic or harmful drugs from his personal supply or from his office supply and may do so without writing a prescription therefor or causing a prescription to be written. If you find that the defendant dispensed such drugs but they came from his personal supply or his office supply, then you will find the defendant not guilty.

REFUSED.

/s/ Jos. B. Dooley
United States District Judge

...ooOoo...

DEFENDANT'S REQUESTED ISSUE NO. 3

If you find that the drugs in question were dispensed by the defendant and that he was at that time a licensed physician in the State of Texas, then you will find him not guilty.

REFUSED.

/s/ Jos. B. Dooley
United States District Judge

...ooOoo...

DEFENDANT'S REQUESTED ISSUE NO. 4

You are instructed that the United States Government does not have the constitutional right or power to regulate the practice of medicine by physicians. The power and that right is reserved to the several states of this union. If you find that the defendant dispensed the drugs in question, and you further find that in dispensing those drugs he was acting as a physician under the authority of the license issued to him by the State of Texas, then you will find the defendant not guilty.

REFUSED.

/s/ Jos. B. Dooley
United States District Judge

...ooOoo...

JUDGMENT & COMMITMENT

(Number and Title Omitted)

On this 14th day of February, 1957, came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED THAT the defendant has been convicted upon his plea of not guilty to each of the three counts and a verdict of guilty on each of the three counts of the offense of dispensing drugs which had been shipped in interstate commerce without a prescription as charged in 3 counts of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative On Count One he is confined for five (5) months in Federal prison; and it is the further judgment and sentence of the court on the Second Count that the defendant be fined Five Hundred (500.00) Dollars, but the imposition of any imprisonment under that count is suspended and as to any such imprisonment the defendant is put on probation for four (4) years, subject to the usual terms of probation and also to the condition that the fine must be paid within sixty (60) days; and it is the further

sentence and judgment of the Court on the Third Count that the imposition of any imprisonment or fine under that count be suspended and defendant put on probation in respect to that count for four (4) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Jos. B. Dooley
United States District Judge

I have executed the with Judgment and Commitment as follows:

Defendant delivered on 14 February 1957 to Potter County Jail, Amarillo, Texas.

Defendant noted appeal on 15 February 1957 .

Defendant released on $1,500 bond on 15 February 1957

Defendant elected, on 15 February 1957 not to commence service of the sentence.

Defendant's appeal determined on Pending.

Defendant delivered on does not apply to at , the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

22 February 1957

/s/ Hobart K. McDowell
United States Marshal

by /s/ S. C. White
Deputy

MOTION FOR BAIL

(Number and Title Omitted.) (Filed: February 15, 1957)

1. Judgment was entered against defendant in this Court on February 14, 1957, adjudging the defendant guilty of violating the Pure Food and Drug Act, and sentencing him to imprisonment for a term of five (5) months and fining him in the amount of Five Hundred Dollars ($500.00).

2. The defendant has filed a motion for judgment of acquittal which was overruled and, within the time limits provided by law, will reurge such motion and contemplates the filing of motion for new trial before filing notice of appeal to the Court of Appeals.

3. The defendant is now in the custody of the United States Marshal, pursuant to sentence of this Court.

4. This defendant desires to submit to this Court authorities supporting his reurged motion for judgment of acquittal.

5. In support of this motion, the defendant presents the accompanying memoranda of authorities.

WHEREFORE, defendant moves the Court for an order admitting him to bail pending the filing of his notice of appeal to the Court of Appeals of the Fifth Circuit.

ATTORNEY FOR DEFENDANT

s/ Ben Monning, Jr.

BEN MONNING, JR.
1016 Fisk Building
Amarillo, Texas

ORDER OVERRULING MOTION FOR BAIL

(Number and Title Omitted.)

The motion of the defendant for bail after sentence and before the perfection of appeal to the Court of Appeals, having been presented to me on February 15, 1957, before the filing by the defendant of his notice of appeal, was duly considered, and it appearing that the defendant has been sentenced, but has not perfected his appeal, and that such proposed appeal is neither frivolous nor taken for delay, but the provisions of Rules 32 (a) and 46 (a) (2) do not authorize the district court to grant bail after sentencing and before perfection of appeal to the Court of Appeals,

It is ordered that the motion be denied.

Rendered February 15, 1957, before the filing by the defendant of notice of appeal, and entered on February 23rd, 1957.

JOS. B. DOOLEY

UNITED STATES DISTRICT JUDGE

....ooOoo....

NOTICE OF APPEAL

(Number and Title Omitted.)

Name and Address of Appellant: Thomas Guy Brown, Dumas, Texas.

Name and Address of Appellant's Attorney: Ben Monning, Jr., 1016 Fisk Building, Amarillo, Texas.

Offense: Three violations of Section 353 (b)(1) of Title 21, U.S.C.A., The Pure Food and Drug Act.

Concise Statement of Judgment or Order Giving Date and Any Sentence: Judgment was entered on February 14, 1957, convicting the defendant on all counts and sentencing the defendant to five (5) months and a fine of Five Hundred Dollars ($500.00) on the first count and suspending sentence on the second count and on the third count.

Name of Institution Where Now Confined If Not on Bail: The DEFENDANT IS IN THE CUSTODY OF THE United States Marshal in Amarillo, Potter County, Texas.

Thomas Guy Brown, the above named appellant hereby appeals to The United States Court of Appeals for the Fifth Circuit from the above stated judgment.

DATED February 15, 1957.

ATTORNEY FOR APPELLANT

/s/ Ben Monning, Jr.

Ben Monning, Jr.
1016 Fisk Building,
Amarillo, Texas

...ooOoo...

BOND

(Number and Title Omitted.)

KNOW ALL MEN BY THESE PRESENTS:

We, Thomas Guy Brown, as principal, and Jim Grabb and Paulus Schroeter, as sureties, are held and firmly bound unto The United States of America in the full and just sum of Fifteen Hundred Dollars to be paid to the said United States of America to which payment well and truly to be made,

we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our Seals, and Dated this 15th day of February, 1957,

WHEREAS lately at the January Term A. D. 1957 of the District Court of the United States for the Northern District of Texas, Amarillo Division, in a suit pending in said Court between The United States of America, plaintiff, and Thomas Guy Brown, defendant, a judgment and sentence was rendered against the said Thomas Guy Brown, and the said Thomas Guy Brown has filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit to reverse the judgment and sentence in the aforesaid suit,

NOW, the condition of the above obligation is such that, if the said Thomas Guy Brown shall appear in the United States Court of Appeals for the Fifth Circuit on the 1st day of the next term thereof, to be held at the City of New Orleans and from day to day thereafter during the said term and from term to term and from time to time until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Court of Appeals for the Fifths Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence of the said District Court against him shall be affirmed by the said United States Court of Appeals, for the Fifth Circuit, then the above obligation to be void; else, to remain in full force, virtue

and effect.

s/ T. G. Brown, M. D.
Thomas Guy Brown

s/ Jim Crabb
Jim Crabb

s/ Paulus Schroeter

APPROVED:

s/ Jos. B. Dooley
Joseph B. Dooley,
District Judge

****

TRANSCRIPT OF TESTIMONY

(Number and Title Omitted) (Filed April 24, 1957)

A P P E A R A N C E S:

Mr. Heard L. Floore, United States Attorney, Northern District of Texas, And Mr. Cavett S. Binion, Asst. U. S. Attorney, Ft. Worth, Tex. Appearing for the Government

Mr. Geo. S. McCarthy, Fisk Building, Amarillo, Texas, And Mr. Ben Monning, Jr., Fisk Building, Amarillo, Texas Appearing for the Defendant

Statement of Facts in the above styled and numbered cause before the Honorable Joseph B. Dooley, United States District Judge, and a jury, beginning February 11th, 1957, at Amarillo, Texas.

****

EUGENE SPIVAK,

Called by the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BINION:

Q. What is your name?

A. Eugene Spivak.

Q. Where do you live?

A. I live in Denver.

Q. What is your occupation?

A. I am an Inspector with the U. S. Food and Drug Administration.

Q. How long have you been an inspector for the U. S. Food and Drug?

A. Nine years.

Q. Give us your education and background, Mr. Spivak,

A. I graduated from high school in Denver in 1937 and entered the University of Colorado and majored in chemistry; got out in May of '42 and entered the Army immediately thereafter.

I was in the Army from May of '42 until January o '46 and entered the University of Denver, and I took some graduate work in chemistry and some biology courses. I was there a year.

I then took a job as a chemist for the Denver & Rio Grand Railraod until January 1948. Then I came to work as an Inspector for the Food and Drug Administration.

Q. What are the duties of an Inspector of the Food and Drug Administration?

A. Well, we make inspections of food plants, such as flour mills, cannaries, and we make investigations, collect samples to determine if there is any violations of the Food and Drug

and Cosmetic Act.

Q. All right. Were you in Dumas, Texas ---- when is the first time you ever saw Dr. Brown? I will put it that way?

A. On March 2nd, 1956.

Q. Where?

A. In Dumas.

Q. And whereabouts in Dumas?

A. In his office.

Q. In Dr. Brown's office?

A. Yes, sir.

Q. That's the first time you had ever seen him?

A. Yes, that's right.

Q. Now you tell this jury what you said to him and what he said to you.

A. He went into his office and he told me to be seated, and asked what he could do for me. I said I would like to get some dexedrine. He reached for a prescription pad and said, "How many?" I said, "Fifty," and he asked my name and I said, "Eugene Spivak."

He completed the prescription, handed it to me and asked if I was in town. I said, "Yah, for awhile." And he said, "Well, then you know where the State Bank is?" And I said, "Yes." He said, "Well, there is a little prescription shop next to it. It's a nice little place and they are a little cheaper on their prescriptions; I suggest you get it filled there."

And I said, "That's fine." I said, "How much do I owe

you?" And he said, "Oh, fifty cents will be enough." I thanked him and left.

Q. How long were you there, would you judge?

A. Oh, not more than five minutes.

Q. Did he give you a physical examination before writing out the prescription?

A. No, sir.

Q. Did he give you any kind of physical examination at all?

A. No.

Q. Did he ask you what you wanted those dexedrine tablets for?

A. No.

Q. Well, when is the next time you saw him?

A. A couple of days later, on March 5th, 1956.

Q. Well, what time of day was it?

A. That was about a quarter to one.

Q. Quarter to one in the afternoon?

A. Yes.

Q. Where did you see him then?

A. I saw him in his office in Dumas.

Q. This Dr. Brown over here?

A. Yes, in the glasses, grey suit.

Q. And tell us what you said to Doc and what Doc said to you?

A. Well, a couple of days later I went in and went into his office and he said, "Be seated." He said, "What can I

do for you?" I said, "I would like to get a prescription for some dexedrine."

He reached for a prescription pad and said, "How many?" I said, "A hundred."

He asked my name and I said, "Eugene Spivak". He completed the prescription and handed it to me and he said, "Dexedrine, huh?" He said, "Did you ever consider anything else?" He said, "You know, you can go to the drug store, buying dexedrine, you are paying a lot of money for a fancy name." He said, "I have some tablets here that are cheaper."

I said no, and he said, "By the way, weren't you in here before?" And I said, "Yes."

He said, "Didn't you say you were a trucker?" And I said yes, and he said, "Well, in your work as a trucker I wish you would keep your eye open for me for some oats. I would like to plant them on my farm." He said, "I went over to the elevator and they didn't have any this morning."

He said also, "In your duties, your work as a driver, I would like to have you keep your eye open for some two-inch pipes so I can drill a well."

On the first visit he hadn't asked me what I did. He asked me this time if I was a trucker. He then spent at least a half hour telling me about his farm, said that he had a thousand acres out there. He said that if I was interested, I could go to work out there, that we would dig a water well, we would irrigate some crops, get some cash, get some money and we would drill for gas. He said he was pretty sure there

was gas out there, there was gas all around him, and once we drilled for gas we would have it made, we would have some money.

He spent quite a bit of time telling me about a burn ointment he developed. He said he spent about twenty years developing it. He said it was the best burn ointment on the market, that when it's applied to severe burns, that skin grafts aren't necessary, that this burn ointment would take care of it. That took about a half hour. There was no discussion about drugs.

I finally brought him back to the subject of drugs. I said, "Did you say that you had a drug like dexedrine?" And he said, "Yes," and I said, "Well, what is it?

He said, "Its amphetamine." He went over to a cabinet and got a brown bottle. I got out of the chair and I stood next to him and he poured some tablets from this bottle into a small cardboard box. He didn't count them, he just merly filled that box to capacity and gave them to me.

I saw that that bottle was labeled "dextro-amphetamine hydrochloride, Lustgarten Laboratories, Philadelphia, five milligram."

He handed me the box containing these tablets and I said, "How much do I owe you for that?" He said nothing. He said, "I told you I wanted you to try these and if I thought you were going to offer me any money, I wouldn't have give you any." He said, "I didn't charge you before," and I said, "Yah, I gave you fifty cents," and he said,

"Well, I shouldn't have taken it." He said, "I believe some day you can help me. I'll scratch your back and you scratch mine."

I said, "Well, I will try these. Maybe I will come back and get a bottle from you," and I thanked him and left.

Q. How long were you there, Mr. Spivak?

A. Well, I was there at least an hour because we were talking about the farm.

Q. During that--this is the second visit now?

A. Yes, that's the second visit.

Q. Did he give you a physical examination?

A. No.

Q. Did he ask you what you wanted the drugs for?

A. No. .

Q. Did he tell you how to use them?

A. No. No.

Q. All right, Did you see Dr. Brown on another occasion?

A. Yes.

Q. When?

A. Well, on March 10th, about a week later.

Q. What is this, about a week later?

A. Well, from the 5th through the 10th, five days I guess.

Q. This is the third visit then?

A. Yes.

Q. Where was he?

A. In his office in Dumas.

Q. All right, What time of day was it?

A. Well, this was about one o'clock--about a quarter to one.

Q. Tell us what you said to him and what he said to you?

A. I said, "I tried out those tablets you gave me and I like them better than the ones I have been getting in the drug store," and he said, "Tablets?".

He said, "Oh, you are the one that got those dexedrine," and I said "Yes," and he said, "Well, those tablets you buy in the drug store, you are paying extra money for the name. You are paying a lot of money for the name "dexedrine", and he said, "I have some tablets that are identical and they only cost a penny a piece", and I said, "Well, I would like to get a bottle."

He said, "I believe I have one" and he left the room, that is, his office, and he was gone, oh, just a half a minute, maybe a minute, and he returned with a brown bottle and he gave it to me.

The bottle was labeled, "Dextro-amphetamine hydrochloride one thousand, five milligram tablet, Lustgarten Laboratories, Philadelphia."

I said, "How much do I owe you for this?" He said, "They cost a penny a piece," and so I gave him $10.00.

I said, "I sure don't want to rob you. You going to be betting some more?" And he said "Oh yes, He said, "I'll be ordering again. Do you want me to save you a bottle?". And I said "Yes."

We then talked about the farm. He asked me if I had any luck finding the cats or the pipe and I said I hadn't.

As I was ready to leave I said, "Well, I will be back in about a week and get another bottle", and he said, "Another bottle in a week? What are you using, about a hundred a week?" And I said "Yes," and he said "Well, he would be ordering again", and asked me if I wanted him to save me a bottle and I said yes.

Q. Did he give you a physical examination before he gave you those tablets?

A. No.

Q. Did he ask you what you wanted with them?

A. No.

Q. Did he tell you how to use them?

A. No.

Q. What did you then do with that bottle?

A. Well, I immediately identified the label on the bottle; that is, I initialed the label "E.S.S." and I put that day's date on it, and I gave it a number. I then sealed that bottle with an official United States Food and Drug Administration seal and identified that seal with my name and that date and a number.

Q. Did he write a prescription for this one thousand now?

A. No, sir.

Q. No prescription?

A. No.

Q. No physical examination?

A. No.

Q. All right

(Marked Government's Exhibit Number 1 for identification.)

Q. I hand you Government's Exhibit Number 1 and right now it has whose seal on there?

A. Well, this is an official Food and Drug seal. It says, "11-26-56, 51-629-M," and it says, "Donald M. Taylor."

Q. All rights, Break it and sail if you can identify it.

(Witness complies.

Q. Can you identify it?

A. Yes, I sell my initials on this label and I see the sample number 51-629-M and March 10th, 1956. It is my handwriting on that label.

Q. All right, Is that the bottle that you have just told us about that you got from the defendant?

A. Yes, it is. I certainly recognized my identification on this label.

MR. BINION:

We offer Government's Exhibit Number 1.

A. Here is a part of my original seal; it's been broken. The chemist analyzed them after I had it but--

MR. MCCARTHY:

We object to the hearsay testimony as to what happened after it left his possession, Your Honor.

MR. BINION:

That's right.

MR. MCCARTHY:

And we object to the exhibit at this time as to the contents because there is no identification.

MR. BINION:

You don't object to us reading what the label says do you?

MR. MCCARTHY:

Oh, no.

Q. How is it identified there?

A. I have written here 51-629-M, E.S.S. my initials, 3-10-56.

Q. And on the label itself it says, "Caution--"

MR. MCCARTHY:

I think the exhibit itself is the best evidence.

MR. BINION:

All right, we won't argue about it.

Q. When is the next time you saw the defendant?

A. On March 2nd.

Q. Where?

A. In his office in Dumas.

Q. And what time did you go in?

A. I went it at quarter of three in the afternoon.

Q. Tell us what you said to the defendant and what the defendant said to you?

A. He asked me to be seated and asked what he could do for me, and I said, "I would like to get another bottle of those amphetamine," and he said he just got three bottles in, he just sold one but he thought he had two left. He said he had a little run on them, he had me and a couple of other fellows,

and he stated, "How come you need another bottle in less than a month"? I said, "Oh, that isn't many."

Q. Less than a month?

A. Yes, from the 10th to the 22nd.

Q. All right.

A. And I said "Oh, that isn't many," and he put his hand on my shoulder and said, "You are sure going downhill. Just a minute." He left the roon and he returned with two brown bottles and he pointed to one and said, "This is twice as strong as the one you had before and this is identical with the bottle you had before."

He said, "Now these stronger ones cost a penny and a half a piece," and I said, "Well, I think I will take the stronger one."

He said, "Well, it's up to you." So I gave him two ten-dollar bills and he gave me five dollars in change. And then he told me, he said to me that I sure let him down on that mechanic. I said, "Well I didn't realize that you wanted a mechanic." He said, "Well, you must have misunderstood." He said he wanted a mechanic to go out on the farm and get some of his equipment repaired and I said I had a friend coming in tomorrow, a fellow by the name of Bob Keating who had done that type of work and that he might have some ideas with regard to getting him a mechanic to fix up some of the farm equipment.

He said, "Well, you bring him in and I'll talk to him."

and that's about it. I thanked him and left. I told him I would come in tomorrow with Bob Keating.

Q. Did he write you out a prescription for those thousand tablets?

A. No.

Q. Did he give you a physical examination?

A. No.

Q. Did he tell you orally how you should take them?

A. No.

Q. What did you do with that bottle and contents?

A. When I left his office I immediately identified that bottle with my initials and that date and a sample number. I then sealed the bottle with an official United States Food and Drug Administration seal which I identified with my name, the sample number and the date.

Q. All right, Dig it out.

(Marked Government's Exhibit Number 2 for identification.")

Q. I hand you Government's Exhibit Number 2 and tell me what you find on there at the present?

A. Well, this has got a seal, a Food and Drug Administration seal. It's 11-26-56, sample number 51-641-M, Donald M. Taylor.

Q. Does it have an official U. S. Food And Drug seal on there? That's Taylor's seal?

A. Yes.

Q. All right, Break it open. Break the seal.

(Witness complies.)

Q. Can you identify it?

A. Yes, I see, "51-641-M, 3-22,56," and my initials and my writing on this label.

Q. Is that the bottle that you got--this is the fourth visit?

A. Yes, sir.

Q. To the defendant's office. Is that the bottle?

A. Yes, sir, because I identified it immediately when I left and I see my identification on here.

Q. What does the label say as the contents?

A. This says, "Dextro-amphetamine sulfate, 10 milligram, one thousand tablets, Richlyn Laboratories, Philadelphia, Pa., caution: Federal law prohibits dispensing without a prescription."

Q. Did you go back the next day?

A. Yes, I came back the next day.

Q. With whom?

A. With Inspector Robert Keating.

Q. About what time did you inspectors get there?

A. We got there at quarter to one--it was about 1:30.

Q. Now tell us what happened in Dr. Brown's presence, what was said by you or the defendant or Inspector Keating?

A. Well, I introduced Inspector Keating to Dr. Brown, as another driver and told him that he was the fellow I said I would bring in that day with regard to getting him a mechanic, and we spent about a half hour talking about the possibility of getting a mechanic. Keating thought he knew somebody down in

Ralls who he could get.

Q. And that took about a half hour?

A. Twice during that time I said to Dr. Brown, I said "Keating here would like to get some of those same pills that I got from you." Each time that I brought it up--I just brought it up in passing-- Dr. Brown ignored the request.

Finally we got up to leave and Inspector Keating said he would like to buy a bottle of those amphetamine. He said that he had heard that he could get them for less than the five and ten cents he was paying for them at the drug store, and Dr. Brown said he wasn't making a racket of it and that he sold to some of his friends, and he turned to me and said, "Is he all right? Will you vouch for him"? I said, "Yes, he's a friend of mine."

Dr. Brown left the room and returned, oh, in thirty seconds, a minute later with the brown bottle of tablets and he handed them to Robert Keating and Keating said, "How much are they?". And he said, "They are a penny a piece," and so he gave Dr. Brown ten dollars and he turned to me and said "I don't want to get in any trouble over this," he says, "but I have sold them to you and you havent gotten me into any trouble, so I guess it's all right," and he turned to me again and said, "Are you going to be needing any more within the next thirty days?" He said, "I am going to be ordering again. Do you want me to save you a bottle?".

At that point Robert Keating said, "That won't be necessary Doctor. We are Inspectors of the Food And Drug Administration."

And his first comment was, "Then you are not truckers?"

Q. All right; how long were you there on that occasion?

A. We were there about an hour. The first half hour we were talking about getting a mechanic.

Q. All right. Now what was done with that thousand tablet bottle?

A. Well, I saw Keating put it in his pocket.

Q. He handled that?

A. Yes, he made the buy so he handled it.

Q. All right. After you all left the defendant's office, did you make some notes about the conservation on each time that you were there?

I will put it this way; Each time that you were in his office did you make notes about the conservation, and so forth?

A. On each time I was there the first thing I did immediately was, in my memorandum in my notebook, I wrote down exactly everything that occurred, word for word, as much as possible. With regard to our conversation about drugs, I think I was able to record that word for word, the dialogue.

When we talked about the farm I just generalized.

Now when Keating and I left there that time we immediately sat down, and together, reviewed what happened word for word and we wrote it in a notebook.

Q. In order to refresh your memory?

A. Yes, we did immediately after we left.

Q. Did the defendant give you a physical examination at that time, this last time you are telling us about?

A. No.

Q. Did he give Keating a physical examination in your presence?

A. No

Q. Did he write out a prescription to you for the tablets that he gave you?

A. No.

Q. In your presence did he write out a prescription for Keating for the tablets?

A. No.

Q. Did he tell you how and in what manner you should take the tablets?

A. No.

Q. In your presence did he tell Keating how or in what manner to take the tablets?

A. No.

Q. No directions?

A. No, no, no.

Q. All of this took place at Dumas, Texas?

A. Yes, sir.

Q. Let me get your bottles straight.

A. This is the second time. (Indicating)

****

ROBERT E. KEATING,

called by the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLOORE:

Q. Please state your name.

A. Robert E. Keating.

Q. By whom are you employed?

A. United States Food and Drug Administration.

Q. In what capacity?

A. I am an inspector.

Q. How long have you been so employed?

A. Approximately six and a half years.

Q. All right, Now please give us briefly your educational background?

A. I graduated from high school in 1942, Denver, Colorado. I attended the Colorado A. & M. College and the University of Denver and received a Bachelors Degree in Science in December of 1949--1948, pardon me.

In August of 1949 I received my Master of Science Degree at the Denver University.

Q. What was your major subject?

A. Botony and biology.

Q. During the meantime, between graduating from high school and graduating from college, were you in the military service?

A. Yes, sir, I was.

Q. Now, I will call your attention to a date, that is, the 23rd day of March in the year 1956, and a place, that is, Dumas, Texas, which is not very far from Amarillo, and I will ask you, are you familiar with that location?

A. Yes, sir.

Q. I will ask you where you were then on that date?

A. I was in Dr. Brown's place of business in Dumas, Texas in company with Inspector Eugene Spivak.

Q. Approximately what time of the day did you go in Dr. Brown's place of business, to the best of your recollection?

A. About 1:45.

Q. Prior to that time had you or had you not ever seen Dr. Brown before?

A. I had not.

Q. All right, Were you introduced to Dr. Brown?

A. Yes, I was.

Q. By whom?

A. By Inspector Spivak.

Q. Was anyone present except you, Dr. Brown, and Inspector Spivak?

A. No. sir.

Q. Is the Dr. Brown that you are talking about the man that sits between these two layers here?

A. He is.

Q. Tell us how you were introduced by Inspector Spivak to Dr. Brown?

A. We walked into the office and Doctor was seated in a chair there reading a magazine. Mr. Spivak said, "Doctor, this is Bob Keating, a fellow truck driver, a friend of mine."

Doctor arose and we shook hands and I told Doctor, I told Dr. Brown that Spivak told me that he was looking for a mechanic and I thought perhaps I might be able to get him one

in Ralls, Texas.

Q. Did you spend some time then discussing the subject of mechanics?

A. We discussed the general operation of a farm that Doctor Brown said that he owned, and this mechanic that he wanted to hire was to be part of that operation, and we had a general conversation that lasted about a half hour.

Q. Tell me whether or not during that conversation the subject of drugs came up?

A. Yes, sir, it did.

Q. What was said during that conversation with reference to the subject of drugs?

A. Twice during this general conversation that we had, Inspector Spivak mentioned to Dr. Brown that I would like to get some of the same tablets that he had been buying from him, and Dr. Brown did not heed this question.

After this conversation was over, we arose to leave and as we did so, why, I mentioned to Dr. Brown, I said to Dr. Brown that I would like to get some of the tablets that he had been selling to Spivak because I understood from Spivak that he could give them to me cheaper than the five and ten-cent tablet that I had been paying for them in the drug store.

Q. All right, What happened then?

A. He said--

Q. Who is "he", if you please?

A. Dr. Brown said, "I don't make a racket of selling these

things, but I do have a few friends that I will sell to.

He turned to Inspector Spivak and he said, "Will you vouch for him"? Is he all right?" Inspector Spivak said yes, he would vouch for me, that I was a friend of his.

Dr. Brown then looked in a cabinet that he had in this room where we were, and saw some bottles there and they were partially filled or partially used. Then he left the room and went down the hall(we could hear him walking down the hall and opening a door and returning), he returned to our room in about, oh, two or three minutes, a very short time. He had a large bottle with him that was brown in color and full of little round tablets. He gave it to me and I asked him how much he wanted for it, how much I owed him, and he said, "Well, they are a penny a piece. I don't try to make anything on them." He said a penny a piece so I gave him the ten dollars bill and took possession of this bottle.

Q. All right, Now, let's confine our conversation for a moment to the subject of the bottle. What did you do with that bottle? Did you retain it in your possession?

A. Yes, sir, I put this bottle in my pocket and kept it with me at all times.

Q. All right. Now thereafter, what did you do with the bottle?

A. Well, immediately upon leaving Dr. Brown's place of business that afternoon, I identified the label of this bottle.

Q. How?

A. By placing the sample number 51-642-M. the date, 3-23-56,

and my initials, R. E. K., on the label in indelible pencil.

Q. After so identifying that sample, what did you do?

A. I placed an official Food And Drug Administration seal inscribed with the number 51-642-M, the date, 3-23-56, and my name, Robert E. Keating, over the top of the bottle.

Q. Then what did you do with that bottle thereafter?

A. I kept this bottle in my possession for the next three or four days until we finished our business in this area. We returned to Denver, Colorado and I submitted this bottle to our analytical laboratory in our Denver District Office.

Q. Did you bodily deliver possession there?

A. Yes.

(Marked Government's Exhibit #3 for identification).

Q. I hand you herewith an article, parcel, which has been marked Government's Exhibit #3, I call your attention to the fact that this is securely sealed and that the seal is unbroken.

I will ask you now to open this and please open it in such a manner that the identity of the seal is preserved.

A. There is an inner package that has already been broken.

Q. Please open that also.

MR. FLOORE:

Mr. Reporter, will you please mark the bottle which has come therefrom without the package, also Government's Exhibit 3.

(The bottle was so marked)

Q. I will ask you to examine the bottle being labeled Government's Exhibit 3. Do you recognize that bottle?

A. Yes, this is the bottle I have just described as having been purchased from Dr. Brown that afternoon.

Q. By whom?

A. By me.

Q. How do you know?

A. I recognize my handwriting on here and the identification the sample number 51-642-M, the date 3-23-56 and my initials, R.E.K. Also on this bottle is the official, the remains of the official Food and Drug seal that I placed on there following the completion of our business that afternoon. It is inscribed 51-642-M, the day 3-23-56 and my name, Robert E. Keating.

Q. All right, We now offer in evidence Government's Exhibit #3.

Now, Mr. Keating, after receipt of that bottle, tell me what happened.

A. Well, as I gave Dr. Brown the ten-dollar bill in payment of this bottle and stuck the bottle in my pocket, he turned to inspector Spivak and said, "I guess this is all right. I have been selling them to you and you haven't gotten me in trouble," and Spivak nodded his head.

Then Dr. Brown said, "Well, now, will you be needing more? I'll be ordering some and will save you some more if you want some more." I told Dr. Brown that wouldn't be necessary since we were Food and Drug inspectors. I introduced myself as

Robert E. Keating, an inspector from the Food And Drug Administration, and offered him my credentials for his examination.

Q. Now, I will ask you, sir, at any time did Dr. Brown make any examination of you whatsoever, to your knowledge?

A. No, sir.

Q. Anytime prior to this date of any nature?"

A. No, sir.

****

ARTHUR GROLLMAN

called by the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLOORE:

Q. Please state your name.

A. Arthur Grollman; Dallas, Texas.

Q. What is your business or profession?

A. I am Professor and Chairman of the Department of Experimental Medicine at the Southwestern Medical School of the University of Texas.

Q Are you likewise a licensed and practicing physician?

A Yes, sir.

Q. How long have you been employed by Southwestern Medical School?

A. I have been in their employe since they opened in 1944.

Q. Now how long have you been Professor of Experimental Medicine at Southwestern Medical School?

A. Since the same time.

Q. Please describe briefly the duties of your employment as Professor of Experimental Medicine?

A. The employment consists of a mixture of teaching medical students medicine, the practice of medicine (particularly consultation practice), plus practice in the hospital as attending physician of Parkland Memorial Hospital; and, finally research.

The teaching also comprises another position as Lectuer in pharmacology and toxicology at the University of Texas at Galveston.

And consultant at the Baylor University Hospital in Dallas the Veterans Administration Hospitals at Dallas, Sheppard Field Air Force Hospital in Wichita Falls, and as consultant in medicine to the Surgeon General of the United States Air Force, the latter positions involving primarily seeing of patients.

Q. All right. What is your educational background and your professional background prior to the present duties that you have assumed since 1944?

A. I graduated at the Johns Hopkins University in 1920, received my Doctor of Philosophy in chemistry in 1923 and my Doctor of Medicient at the same University in 1930.

I taught at the Johns Hopkins University between 1920 and 1941, except for one year as a Gugenheimer Fellow at the Universities of Berlin and Heidleberg, between 1930 and 1931, and with Associate Professor of Physiology of John Hopkins between 1924 to 1930; Instructor of Chemistry the year prior to that.

I was Associate Professor of Pharmacology and Therapeutics at Johns Hopkins between 1932 and 1941; Professor of Medicine at Wake Forrest College School of Medicine between 1941 and 1944.

Q. Doctor, do you belong to any scientific or professional societies?

A. Yes, sir I belong to the principal scientific societies

of the country; the American Medical Association, Texas Medical Association, Dallas Internal Medical Society, Texas Society of Internists, the American Physiological Society, American Chemical, American Society for Pharmacology and Therapeutics and New York Academy of Medicine; a Fellow of the American Association of Physicians, College of Physicians, rather; a corresponding member, honorary member, of the Portugese Society of Endocrinology.

Q. Have you made any contributions to the scientific and medical literature dealing with the action of drugs upon the human body?

A. Yes, sir, I have written over seven hundred original scientific articles dealing with various aspects of medicine, including therapeutics.

Q. Where were these articles publishes?

A. In the various scientific journals devoted to this subject.

Q. Have you written any books?

A. I have written a half a dozen books, text books, in medicine, dealing with various aspects of medicine, including a text book on pharmacology and therapeutics, dealing with the use of drugs.

Q. When was that written?

A. The original edition was written in 1942, and I recall, The more recent editions have been appearing since then at various intervals. The latest third edition is in the press now.

Q. And is that text book widely used in medical schools and pharmacological schools?

A. Yes, sir. It's used fairly widely in this country and has been translated into several foreign languages and is used abroad.

Q. What is the science of pharmacology?

A. The science of pharmacology deals with the action and use of drugs.

Q. Are you familiar with the dextro-amphetamine drugs, and in particular, destro-amphetamine hydrochloride and dextro-amphetamine sulfate?

A. Yes, sir, I am.

Q. Do you know whether or not these drugs have a popular name with some people?

A. Yes, they do, I think they are better known by the laity by their trade name; used to be well known as Benzedrine, which is a trade name of the company that originally put these compounds out.

They are better known in the underworld, I believe, as just short "bennies," and I think those are also known as Dexedrine, very commonly by another class of society.

They are known by these various names, referring to various forms of the product.

Q. What about "pep pills" and "goof balls"?

A. I think the word "pep pill" is commonly used in certain circles, and "goof balls," as I understand (I am not an expert on language in the underworld) but I think they apply

that to any pill that makes them goofy, and I think they include the barbiturate or usually the combination which they are taking.

Q. That is, that particular terminology, goof pill, applies to both the amphetamines and the barbiturates?

A. I think that's the way it's used, sir, yes, sir.

Q. What is the difference, Doctor, between an amphetamine, Dexedrine and Benzedrine?

A. Well, sir, chemically, if I may start with that, amphetamine is alpha, methyl, phenyl, ethyl, amine. Now that's the chemical name, strictly chemically speaking, the way it is made. Rather than say all of that each time you refer to it, they take the initials, the first, "a" for "alpha", and "me" for "methyl", and"phe" for "phenyl," and stick it together and you have got "amphetamine," so that's the chemical name.

Now that material has two, what chemists know as isomers, the same compound but one is more active biologically than the other,and so it can be broken down into these isomers, one of which will turn light, if you put it in the polarimeter, will turn right and is called "dextro". Another turns to the left and is called "levo". So you have, therefore, dextro-amphetamine, which is also known for short as dexedrine or by the trade name Benzedrine--I am sorry, Benzedrine is a trade name of the racemic amphetamine, that is the mixture, or, rather, amphetamine is another name for just the amphetamine--all of those names refer to these different

products, chemically the same substance.

Q. In what forms are the amphetamine drugs available?

A. Well, there are a variety, if you include amphetamine drugs. There are also certain derivatives of amphetamines we have been talking about; for instance, there is an hydrozyn-amphetamine which merely has one group that is different. That is used mainly in the eye.

There is another group which is the methyl derivative, and that's known as methamphetamine and that's commonly used just like amphetamine; so far as the uses of amphetamine, I would say that included amphetamine and methamphetamine, which is also known as desoxyephedrine because chemically it's related to the drug long known as ephedrine, or desoxyn is another term for it; I think that's a trade name for the material.

So that you have these relative groups. Now they in turn are available as different salts, the sale having no particular effect on their action, but in order to have drugs most suitable for administration we usually, manufacturers do, make them in a form that's easily taken; for example, amphetamine itself is volatile--it's a liquid-- it wouldn't do to try to take it by mouth than in this form. It's fine for an inhaler, and they used to be available as inhalers; that was the pure compound.

If you wanted to take a pill, you would want it in a non-volatile, something that wouldn't evaporate, non-liquid form, so then they make the sale, so you have the hydrochloride,

the sulfate, and there is also a phosphate, if you, as we do medically occasionally, inject it, because that happens to have certain properties that make it more suitable for that purpose.

Q How do these drugs (and I refer in particular now to dextro-amphetamine hydrochloride and dextro-amphetamine sulfate), how do these particular drugs affect the functions of the body, if they do affect them?

A Yes, sir, they affect the functions of the body rather profoundly so that a small amount, several milligrans, which means a thousandth (a milligram being a thousandth of a gram and a gram being a thirtieth of an ounce), it's just a speck of the material, if taken by a normal-size individual, will have many effects in his body; effects on the heart, the blood vessels and many other tissues.

Their principal action, however, for which they are used, both medically, primarily, and otherwise, is because of their effect on the nervous system. They stimulate, primarily. It's primarily a stimulating effect on the nervous system specifically, and particularly, rather, the central nervous system, certain parts of the brain.

Q. What adverse effects do they have if they have adverse effects on the body?

A. Yes, sir. Well, the adverse effect, any effect which isn't desired of course, would be considered as an adverse effect, they will tend, for example, to raise blood pressure; and,

hence, if the individual's pressure is already elevated, that might cause an increased rise in pressure to perhaps break a blood vessel. That would be considered an adverse effect, the effect on the blood pressure, the effect on the heart--those are the principal ones that are considered adverse.

The effect of course on the nervous system itself would be considered adverse where it isn't desired, for example, if it keeps you awake all night, that's an effect on the nervous system but it's an adverse effect if that's not what you are trying to do to the patient; or if it in some way blunted his intellectual capacities, which they often do, that too.

If it stimulated the peripheral nervous system so the patient, for example, had a convulsion, that would be considered an adverse effect, So they have many adverse effects.

Q. What is the usual dosage range of dextro-amphetamine, Doctor?

A. The usual dosage range, as included in the U. S. Pharmacopoeia, which of course is Congress' legal Code for this, is gien as 2.5,2-1/2, 10 milligrams as the usual range.

Q. That is, per dose?

A. Per dose. And usually, as far as per diem, would depend entirely of course on the condition that you are treating, There are rare conditions in which you might use it as often as two or three times a day. For most purposes, however, they are used as a small amount, even the minimal dose perhaps being the 2.5. You very often use even less than that, either

once to, at most, perhaps three times a day.

Q. You have a bottle of tablets in front of you, Doctor.

A. I believe it is marked Government Exhibit--

Q. Either 1 or 3. Now that purports to be a bottle of 5-milligram tablets, is that right?

A. Yes, sir, 5-milligrams.

Q. So the usual dosage would range from one to two of those tablets?

A. I would say for most conditions, used medically, yes, sir at most. For many purposes, these I notice are also scored, which means that for many purposes you try to save the patient money by giving him a big tablet and have him break them in half so that this was actually intended to be broken inhalf, which would give you your 2-1/2, the minimal average or usual range of dose.

Q. In other words, a half tablet would be your two and a half dose, is that right?

A. Yes, sir, half of these where they are scored, they would be broken in half by the patient, so he would take a half of one of these usually for most purposes, that would be ample several times at most a day, once, or let's say three or four times would be the usual, most times.

Q. Doctor, in your opinion, should any individual whomsoever ever take a dextro-amphetamine tablet except after a physicial examination by a physician?

A. I think it would be dangerous for him to do so and he certainly should not.

Q. And would the quantity that was taken increase the danger?

A. Definitely. It would be proportional to the amount.

Q. If a person should take--if he has a condition which would indicate the taking of dextro-amphetamine tablets, should that taking be done strictly in accord with the Doctor's prescription?

A. I think very definitely, sir.

Q. And should the doctor from time to time recheck the patient?

A. Definitely, yes sir.

Q. And should the dosage possibly be changed from time to time in accord with what the doctor finds?

A. Yes, sir, after the preliminary adjustment to the required dose, depending upon what he wishes to attain.

A. What determines what dosage of dextro-amphetamine should be administered by a physician?

A. It depends entirely on what he's using it for, in the first place, as to the importance of it, of his use. I would say that was the primary thing. And the reaction, for example, if a patient appears to be dying of severe intoxication, let's say by alcohol, or is in a hospital unconscious, why, naturally he will be dead unless you stimulate his brain rather rapidly. In that case you would start with a large dose. You wouldn't piddle with small doses in order to save his life, so that's an instance where you would use a very large dose the top, say 10 milligrams. That's why the range is given at that point.

Q. That would be two of those tablets?

A. Well, in that case you wouldn't actually use the tablets, sir; you would inject it, you would use injectable form because if he's in that state he couldn't absorb the tablet; unless you had nothing better, you would inject a liquid, a liquid form of this same drug.

On the other hand, if you are dealing and using it for some other purposes, let's say to stimulate a psychotically depressed individual temporarily for a few days while you are trying to get ready for more fundamental therapy, why, you would use, on the usual dose, you would start with about a half of one of these tablets or, at most, if it were very severe and if it were a large individual--of course size makes a difference, if you are dealing with a big, fat fellow compared to a little, thin woman, why, that in itself would make a difference as to whether you were using a half or one, because the dose varies with size, age; if it were a child obviously you wouldn't use these bigger doses..

Q. Doctor, are there dangers in the unsupervised use of the dextro-amphetamine drugs?

A. Yes, sir.

Q. What are these dangers?

A. Well, you would say the danger in the extreme might be death. That would be the extreme case.

I think there are many instances on record in the literature of death occurring from the unsupervised use of the material where the stimulation has gone on and the individual finally goes into a convulsion and dies, then you found hemor-

rhages in his brain. For example, that's for a normal individual taking too many. In other words, any of us could kill ourselves, assuming we are normal, by just taking too many of these for too often or too long a time or even once taking too much of it at one time.

On the other hand, if we happen to have high blood pressure, for example, or some cardiac condition and merely took what's considered a usual dose of the drug, we might end up with a stroke right quickly, even with what appeared to be a normal dose.

So there would always be a danger in any case in the normal or the abnormal individual of unsupervised use in a dosage note proper for that particular condition.

Q. What would be some of the other effects? You have named the extreme effect, death, in a large overdose. What would be some of the other effects that would be obtained from an overdose?

A. Well, an overdose that didn't lead to convulsions and death and hemorrhages of that sort might lead, and one of ten sees that, as a matter of fact, from overdoses, to an inordinate nervousness; the individual would get so jittery and nervous, in the first place, he couldn't sleep at night; he would stay up all night, and of course loss of sleep for any particular period, it is fatal in itself, without inducing any accutely fatal effects. But he would be so jittery, as a laymen puts it, and so nervous that he would sooh have to take something to quiet him down, which I think is the reason

that you usually find, where it's taken for illegitimate purposes, in combination with a barbiturate to tone you down, so that that's almost an essential compliment which accounts for this exceedingly jitterness and felling of nervousness that the individual complains of. That often occurs even with small doses. Patients given the drug in tiny doses will say they can't sleep at night or are so nervous they can't do their work, so the drug--

Q. What would be some of the mental effects of taking more than a person could reasonably take of dextro-amphetamine?

A. Well, as far as tolerating--when we speak of "toleration", we mean what they can put up with, depending on the individau; some people can put up with a lot more than others can and perhaps wouldn't mind staying up all night if they are doing it, where some other individual would consider that as an intolerable thing. There are certain spheres and groups, I should think, that might consider their ability to stay up all night as a desirable thing. So there it becomes a matter of the individual.

The other effects would be that this undue stimulation might lead the individual to do acts which they would normally not attempt to do, and if carried on long enough, of course, it would make him relatively irresponsibile; in other words; an over-stimulation of the brain action, that part of the brain is no longer normal, so for practical purposes he is no longer a human with a normal brain, but is a human with an abnormal brain and is inhuman in that respect.

Q. What would it do with reference to hallucinations, if anything?

A. Very often of course-- of course any stimulant, all stimulating drugs tend in most individuals to lead to hallucinations. That's why the drunk, for example, although that is not, strictly speaking, a stimulating drug, sees pink elephants. Whenever you overstimulate the brain you get extra visual signs, taking marijuana, for example, hashishee and the other drugs which are stimulants tendto give you hallucinations, imaginary things.

Q. What would it do with reference to sullenness and pugnacity?

A. In general I would say it would tend to stimulate those for two reasons: in the first place, as I said before, by making the individual unnatural and abnormal, he will do many things, which, under a normal state, he would not do; and secondly, it would give him a certain false courage by stimulating. That's why the word "hashish", for example, which is a form of marijuana, was used, and where we get the word "assassin". These people took that in order, hired assassins in order to get enough courage to assassinate somebody.

So you get a false courage under the influence of the stimulation of drugs.

Q. All right, With reference to libido, what would it do, if anything, and first tell the jury the meaning of that technical term?

A. The term "libido" means a desire for sexual activity.

Frankly, I think, as far as the biological evidence is concerned, I don't think, as far as the biological evidence is concerned, I don't think the drug itself probably, as far as we know, has any effect on the libido. However, the libido is determined more by psychic factors rather than biologocial factors, if you understand what I mean, and therefore, by stimulating them unnaturally it would tend to make the individual perform acts which suggested an increase in libido; so that in a sense, not in the true sense, I would say, true scientific sense, I would say it wouldn't have any effect.

From a practical sense, it would appear to increase the libido, and I think that's the basis for the view that the drug has an aphrodisiac action; I don't think scientifically it does.

Q. In your opinion is dextro-amphetamine a drug which may be safely used by the general public without the constant supervision of a physician?

A. No. sir, absolutely not.

(Thereupon, a recess was taken until 1:30 o'clock p.m.)

AFTERNOON SESSION

THE COURT:

All right, go ahead,

BY MR. FLOORE

Q. You are the same Dr. Grollman who was on the stand before the noon recess, are you not?

A. Yes.

Q. Merely for the record, now, the last question I asked you, if my recollection be correct, is whether or not in your opinion, dextro-amphetamine is a drug which may be safely used by the general public without supervision of a physician, and your answer was, "No. absolutely not." Why, Doctor, is that so?

A. In the first place, because of its potential harmfulness and, in fact, that in itself would suffice against its being so used.

Q. Now should the doctor frequently check that patient to see the effect, see, that no harmful effect is coming out?

A. He could see, as far--that would be one reason, so the patient himself gets no harm. He would check him. But likewise it seems to me that what he wouldn't check is for the potential harmfulness in the sense of what that patient might do to society which might not be too easily tested, so that they are both aspects of it that would mitigate.--

Q Doctor, if you were prescribing dextro-amphetamine for an average patient for a given condition, approximately how many tablets would you prescribe at any given time, depending upon the condition that was being treated?

A. Well, it would certainly vary with the condition; for example, for a case of accute depression, or intoxication let's say, you wouldn't prescribed it at all; you would give it to him by injection and have it over with.

If you were prescribing it for a patient with a very rare disease, which is perhaps its most common or best use, of

a scientific use, for narcolepsy, one might prescribe enough for several weeks, if there were no contra-indications, a week or two.

For most other conditions, the rare conditions, that would use it, I presume there, if it's a case of depression, you would be seeing the patient almost daily so there would be no particular point in giving them more than they needed for their immediate needs. And in such an instance, in fact, I would be personally inclined to merely hand them what they needed for their immediate needs or prescribed a very little.

Q. When a patient returns to you for a checkup, after you had prescribed dextro-amphetamine, tell us what you do, what you check up, what follow-up you would make?

A.Well, in the first place you would merely take a history to find out how they come of themselves, what they had noted, ask them if they had slept well, been able to sleep, So often they will tell you they hadn't been able to sleep, which is something you couldn't tell by looking at them particularly, which in itself would be significant; whether they had pounding in their head, as many of them will tell you, even before you---as soon as you ask them how they have gotten along.

As far as the actual physical examination, after you have gotten these historical facts, you would certainly want to take their blood pressure; you would want to check their pulse; listen to their heart to see if there had been any rhythmic change--those would be the most important things.

Q. Now Doctor, you have stated in your opinion that this

drug should not be given except under the supervision of a physician and you have gone into considerable detail to tell us why.

I will ask you, does your opinion reflect the consensus of informed medical opinion over the country today?

A. I think it does and it certainly should, since that represents the official opinions as given by official compendium, text books, and so on.

Q. In your practice, how often do you prescribed amphetamine drugs and how much would you estimate that you use in the course of a year, say?

A. I actually prescribed them very infrequently and use very little because the specific indications in which the drugs are recommended in which we don't have better substitutes and better drugs are relatively rare, I would guess that certainly the amount I used during the course of a year would be well under, to give a liberal figure, the equivalent of a hundred tablets.

Q. Doctor, can you think of any practical circumstances under which one thousand tablets would be dispensed to a patient at any one time?

A. No. sir, I cannot.

Q. Doctor, what is a habit-forming drug?

A. A habit-forming drug--

MR. MCCARTHY:

We are going to object to this. There is no issue in this case with reference to habit-forming drugs, under the statute

set out in the Indictment.

MR. FLOORE:

If the Court please, we feel that the statute prohibits the dispensing of certain drugs which are potentially dangerous to man--that's one condition; and the second condition set out there, which should be given only under supervision, or that's the effect of the statute.

THE COURT:

Overruled.

MR. MCCARTHY:

Note our exception.

MR. MONNING:

May we also have our exception go to the fact that the Pure Food And Drug Act Section that is alleged in the Indictment, together with the Harrison Narcotic Act, as a matter of law, eliminate dextro-amphetamine, sulfate and hydrochloride, as a habit-forming drug.

THE COURT:

You say the Act does? What did you say about the Act?

MR. MONNING:

As a matter of law under those two Acts, dextro-amphetamine sulfate and dextro-amphetamine hydrochloride, we contend, is not a habit-forming drug.

THE COURT:

Is there anything in there explicitly to that effect?

MR. MONNING:

There is in section, as I recall, 353, I am sure the Dis-

trict Attorney can correct me if I am mistaken. In subdivision "1" is a definition of those habit-forming drugs.

May it please the Court, I have refreshed my memory a little bit and I would like to state that I refer now to Section 331, Title 21, and I do not know if it is sub-section "j" or sub-section "h".

THE COURT:

What section?

MR . MONNING:

It is section 331, if the Court please, and it is sub-section, if my memory serves me correctly, it is sub-section "h", and if it is not "h" it is either "i" or "j" it is one or two before section "k", I recall that. I am sorry I do not have the statute with me.

THE COURT:

Well, I don't think you have the right section. I am inclined to think you are talking about section 352.

MR. MONNING:

May it please the Court, neither of the attorneys have a copy of the Act before them, and may my exception go to the Act itself and I not be limited to the section that I directed the Court's attention to?

Do I have the Court's permission to approach the bench?

MR. FLOORE:

We have a copy of the Act and we think we have what you have reference to and we have shown it to counsel, the copy of their Act is not the same compilation you have before you.

THE COURT:

Well, but it may still be the same statute.

MR. MONNING:

It may be, sir, but the identity of it, I am not sure of that. They are referring to Section 502, sub-paragraph "D".

THE COURT:

It starts out, "A drug intended for use by man which--"?

MR. FLOORE.

Yes, sir.

THE COURT:

Well, that's it.

MR. MONNING:

That is not the one to which I referred, sir:

THE COURT:

Then I don't know what you refer to.

I think your objection would be good under this unless it is displaced by further predicate. Sustain the objection as it stands.

MR. FLOORE:

All right. May I ask you, Doctor, in medical terminology (and I speak now of the effect of an item upon human bodies as distinguished from what a legal definition may be), in medical terminology, are you familiar with the medical terminology definition of a habit-forming drug?

MR. MCCARTHY:

We object, Your Honor. It is not an issue in this case.

MR. FLOORE:

If the Court please, may I be heard very briefly as to why I asked the question?

THE COURT:

All right.

MR. FLOORE:

The Act provides that a drug intended for use by man which because of its potentiality for harmful effect or the collateral measures necessary to its use is not safe for use except under the supervision of a practitioner--

THE COURT:

What are you reading from? Three thirty-one?

MR. FLOORE:

I read from 353 (b) (1). This evidence is directed towards proof that this particular drug, because of its potentiality for harmful effect and because of the collateral measures necessary for its use is not safe for use.

THE COURT:

Well, are you reading from the "D' you were talking about awhile ago?

MR FLOORE:

Sir, I read from 21 U. S. Code, Section 353 (b) (1).

THE COURT:

Well, that refers to drugs that are not safe for use except under the supervision of a practitioner licensed by law because of its toxicity or other potentiality for harmful effect, or; the method of its use, or the collateral measures

necessary to its use. Now if you wish to frame your question within the bounds of that provision, all well and good, but that doesn't deal with habit-forming drugs.

MR. FLOORE:

All right.

Q. I will ask you, Doctor, is it a potential effect, the use of this particular drug, that a need, eigher physical or mental, would be created in an individual whereby the individual would either demand the use of the drug or would feel that he had to have it?

MR. MCCARTHY:

Now, we object to that again, Your Honor, for the same reason.

THE COURT.

I sustain the objection. It is directed to drugs which because of their toxicity, and so forth, are potentially harmful to the users.

Q. All right, I will ask you, Doctor, what is the social effect of excessive use of dextro-amphetamine?

MR. MCCARTHY:

Again we object. There is no issue in this case with reference to the social effect.

THE COURT:

Overruled.

A. I think there is a definite--

MR. MCCARTHY:

Just a minute.

A. Oh, I am sorry.

THE COURT:

Well, I have overruled the objection.

Q. Go ahead with your answer, Doctor.

A. I feel that there is a definite potentiality and social harm involved in the use of these drugs for two reasons: one the fact that the individual taking them, as I believe I mentioned earlier, is actually not entirely normal insofar as his brain activity is concerned and hence might do things which he normally would not do; and secondly; because under this unnatural stimulation, he, because of this artificial courage which he gets and general acceleration, may do things which he normally would not do.

Q. All right, Doctor, I will ask you whether or not excessive use of dextro-amphetamine drugs leads to anything else with reference to drugs?

A. Usually, I think it's very common observation, if not almost universal, the individual suffers because of this intense anxiety and nervousness that he gets that he has to overcome, particularly the selopiness, pounding in the head, general anxiety and nervousness, so he has to get some artifical method to quiet himself and for which purposes he usually turns to the barbiturates in order to overcome this uncomfortable feeling, so that usually the two go in combination.

Q. All right, Doctor, what is the result of taking both dextro-amphetamine and barbiturates, if there be any result, in

your opinion?

MR. MCCARTHY:

Just a minute, Your Honor. This case has nothing to do with barbiturates, and the way the question is framed, it used the combination of the two, and we certainly object to it.

MR. FLOORE:

If the Court please, this is included within the potential harmful effect, to show that this drug has a potential harmful effect.

THE COURT:

Overruled.

MR.MCCARTHY:

We except.

A The combination of the two, since they each act on different parts of the brain, is merely to sort of compound the difficulty so that the individual is doubly affected in two respects; that is one harm.

And he's less normal than he would be.

But in addition, I think one of the harmful effects of the combination is the fact that it initiates a vicious circle: the individual becomes so nervous he takes the barbiturate, and then he becomes so dopey he has to take some more of the amphetamine derivative to get about and carry on his activity, and then he has to take the other, so it becomes a vicious cycle, and while under influence of both, why, of course he's doubly affected.

Q. How can an individual get out of that cycle?

A. Well, I suppose it would depend on the individual, if his fortitude of character--many of them don't except under police supervision and isolation from contacts,. where they can't get a hold of them.

Q. Is it frequently necessary to hospitalize such an individual?

A. I think it's a frequent occurrence in our hospitals and prisions to hospitalize these individuals who are under the influence of this combination.

Q. All right, Doctor, in your opinion, does the unregulated use of dextro-amphetamine play any part in causing crime?

MR. MCCARTHY:

Just a minute, Your Honor. We certainly object to that. There is no allegation here of an unregulated use and there is no allegation here with reference-- I mean so far as these three Counts in this Charge are concerned. It has nothing to do with the issue. There is no issue involved in the question that was asked here, Your Honor, For that reason we certainly object to it as highly prejudicial.

THE COURT:

Read the question.

(Last question read).

MR. MCCARTHY:

Your Honor, we want to further object because there has been no predicate laid so far as this witness being qualified to answer the question, and of course then for the same reason

that it's not an issue in this case.

THE COURT:

Sustain the objection.

MR. FLOORE:

Pass the witness.

****

THOMAS GUY BROWN,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. McCarthy:

Q. You are Dr. Thomas Guy Brown?

A. Yes sir.

Q. Dr. Brown, are you at this time licensed to practice medicine?

A. Yes, sir.

Q. In Texas.

(Defendant's Exhibit Numbers 4, 5 and 6 for identification).

Q. Doctor, I first hand you Defendant's Exhibit #4. Without going into detail, just state what that is, if you know?

MR. MCCARTHY:

Let me lead him a little so we can save time.

MR. FLOORE:

Okay.

Q. Is that a certified copy filed in the District Clerk's office of your original license in the State of Texas, Dr. Brown?

A. Well, it's being so long since I saw that, I wouldn't know.

MR. FLOORE:

We will stipulate that it is.

MR. MCCARTHY.

We want it in evidence anyway.

MR. FLOORE:

If you will tell us it is, counsel, we will so stipulate.

Q. Now, Doctor, as a physician in Texas, is it true that you have to have your license renewed each year?

A. Yes sir.

Q. By paying a small fee you have a renewal license?

A. Yes sir.

Q. I will hand you Defendant's Exhibits 5 and 6 and ask you to tell the jury briefly what they are?

A. Well, this is a Texas--

MR. FLOORE:

Consel, please identify it so we know what you are talking about.

Q. Number 5, Doctor, is classified as "Physicians permit, Texas State Board of Medical Examiners, 1956."

A. Yes sir.

Q. Issued by the State Board of Medical Examiners; is that correct?

A. Yes sir.

Q. Do you receive that each year as you go along?

A. Yes, sir.

Q. That's for 1956?

A. Yes sir.

Q. Is that a duplicate, except that it is '57 being Defendant's Exhibit 6?

A. Yes, sir, that's right.

Q. Now, without burdening the record, Doctor, have you had an active license--

A. Yes sir, I think so.

Q --from the time that you obtained your first license-- I mean have you been actively practicing medicine in Dumas actually since 1930?

A. Yes.

Q. Now Doctor, I first want to ask you, where were you born?

A. I was born in a little town called Pele, Arkansas.

Q. Is that near the Missouri line?

A. It's five miles south of the Missouri line.

Q. How long did you live there?

A. I lived there to 1912.

Q. What is your date of birth, Doctor, or when were you born?

A. January 10, '94.

Q. January 10, '94?

A. Yes, sir, 1894.

Q. You are how old today?

A. About 63, I guess, according to that.

Q. Now Doctor, where did you have your early schooling?

A. Well, at that particular time, as I remember it, there was a school house and wasn't nobody lived in this place and

it was on top of a bluff and the closest neighbor I guess was four miles, and that was our place, and we had what we call "conscript schools". I learned that after I got older. I didn't know it then. Every family around there paid so much a month to have their children sent to school,

Q. That was your first initiation in school, what is known as conscript school?

A. Yes, sir.

Q. How long did you go to that school?

A. Well, it ran usually from two to two and half months; that was between planting cotton and gathering the crops.

Q. What kind of business was your father in?

A. He was cotton planter.

Q. Of what degree?

A. Well, it was a small degree then at that time because the only plows we had was double shovels and Georgia Stocks and a man couldn't get over much land.

Q. Did you have a mule?

A. Had a horse.

Q. That was your cotton business?

A. Yes sir.

Q. Did you have any schooling after that, before you went int---

A. Every year we had about two months winter school on top of that each year, about two and a half months summer school and two months winter school.

Q. How long did that continue and at what age did you--

A. Up until I was--let's see, I was about 12 years old.

Q. Then were you through with your schooling? Did you absorb anything that they had there?

A. Yes, We only had three books.

Q. Three books?

A. Yes, sir, Webster's Blue Back Speller and McGuffy's Reader and an arthmetic book. That was my twelve years.----

Q. You had absorbed that?

A. Yes, sir.

Q. When was the next time you had any education at all, Doctor?

A. Well, my folks decided that I had an uncle that was a doctor and he lived in, close to Walnut Ridge, between that and Pocahontas, in Randolph County, and my folks moved down there, or my dad, to run his farms so we could get some chance at schooling.

Q. Did you go to school there?

Q. I went to one nine-month school, 1912 and 1913. That winter is the first nine months school I have went to.

Q. Do you have any idea what grade you were in at the conclusion of that?

A. Well, there wasn't any particular grade, and you just still had a certain type of books, and I think they said it would be about the sixth grade right now.

Q. What happened to you after that, Doctor?

A. Well, I worked on this farm and worked for my uncle and

he had a rice farm and it was a pond in this rice farm. When that was drained I plowed that up with his buggy team and put that in rice. When that fall come I had $87.00. That's the first money I ever owned.

Q. First you had ever owned?

A. Yes, sir.

Q. You were how old?

A. I was about sixteen years old.

Q. Did you go into World Ward I, Doctor?

A. Yes sir.

Q. How old were you when you went into World War I?

A. Twenty three.

Q. What did you do from the time you went to this nine month school until you were 23?

A. Hoed and plowed cotton and raised rice.

Q. For your uncle?

A. For my uncle and for my father.

Q. You went into the Service in what year?

A. In '17, 13th day of November.

Q. How long were you in the Service?

A. About three years and a half.

Q. Where were you discharged? Where were you after your discharge?

A. Charleston, South Carolina.

Q. What did you do after that, Doctor?

A. I came right home and went to work. My folks at that time had moved to Calumet, Oklahoma, in Canadian County, and they

had a small farm out there, half a section, and had one team of mules. When I come home they was all sick, and that was in the spring, so I took the mules and broke up that ground and planted as much of it as I could in wheat.

Q. That was in what year now?

Q. 1919.

Q. Did you stay there for awhile?

A. Yes sir, I stayed with them until the 17th day of September of 1919.

Q. What did you do then?

A. I left there and went to Norman, Oklahoma to go to school.

Q. Is that the University?

A. That's the University, yes, sir.

Q. Did you have any money?

A. Had fifteen cents.

Q. Fifteen cents?

A. Yes sir.

Q. Well, now, you certainly didn't go into the University then, did you?

A. Yes, sir--well, I wasn't in the--I hadn't finished my high school and I hadn't any college education, so they had a school there where they would give algebra and a few things you had to have in high school, and I didn't have it, so I took that and took whatever subjects I could in pre-medicine.

Q. That was in 1919?

A. Yes, sir.

Q. You were twenty three years old then?

A I was about twenty five then.

Q. But this preliminary, pre-college work was part of the University of Oklahoma, was it?

A. Yes sir.

Q. I mean it was under the sponsorship of the University?

A. Yes sir.

Q. Did you continue to go through this preliminary work there at the University?

A. Yes sir.

Q. Did you go through your twelve months period or nine or what?

A. I went through nine, and for awhile I spent three months of it at Calumet at home because my mother was sick and my dad wasn't able to get around very good and they didn't have anybody to help them with the work, and so I went home in the spring when the school term was out and stayed there until the fall term started in.

Q. Well, now how many years, Doctor, did you continue, to go to the University of Oklahoma?

A. Unitl June 4th, 1929.

Q. You mean for ten years?

A. Yes, sir.

Q, Were those full years or were they nine months?

A. They were nine months for the first time or four years and after that they was twelve months around.

Q. Now you mean then , for the last six years at least, that you went straight through, twelve months a year?

A. Yes sir.

Q. For six years?

A. Yes, sir.

Q. Now, as a result of that ten years, did you finish your high school?

A. Yes, sir.

Q. Did you finish what is known as your BS Degree?

A. Yes sir.

Q. At The University of Oklahoma?

A. Yes sir.

Q. Did you then take some pre-med work?

A. Yes, sir, I had taken pre-med.

Q. Was that part of your Bachelor of Science Degree?

A. Yes, sir.

Q. Then did you go into Medical School?

A. Yes, sir.

Q.. How long were you in Medical School?

A. I was there six years.

Q. Six years in Medical School. How did you provide yourself with a living and tuition, and so forth, and go to school during that time?

A. I was a mechanic, first-class mechanic, after I come out of the navy, and then I had had lots of mechanical work before I got there, and I overhauled Model"T" Fords until I got to my tutition paid off, and I worked at a fraternity house for my room and board.

Q. What kind or work did you do there?

A. Taking care of all the utilities in the building, such as electricity and gas, and kept the furnances, and then anything else that come up, why, I was tne one to do it.

Q. Doing mechanical work besides that?

A. Yes sir.

Q. How long did that working for this fraternity--were you a member of the fraternity?

A. No. sir.

Q. Why?

A. Didn't have enough money.

Q. But you did work for them for some six years?

A. Seven.

Q. You did mechanical work on the side?

A. Yes, sir.

Q. Went to school for twelve months each year; is that right?

A. Yes, sir.

Q. Then you finished your medical school and got your medical degree?

A. Yes, Sir.

Q. From the University of Oklahoma, in what year?

A. '29.

Q. Where did you first start practicing?

A. I started practicing at Sweetwater, Oklahoma.

Q. Sweetwater?

A. Yes, sir. Dr. Threadgill hadn't had a vacation in a long time and he asked me to come out there and take over his practice while he went on a vacation.

Q. Now soon after graduation did you make application for a license to practice in Texas?

A. Let's see, I believe it was maybe in February of '30.

Q. February of '30?

A. Yes, sir, I believe that's the way it was, but I am not sure of that because--

Q. Let me ask you this: did you immediately obtain your license after application?

A. No, sir. I had to go on probation for six months.

Q. What is done, if you know, during that six months period?

A. What?

Q. What is done by the Medical Board during that six months period?

A. Well, they write to your home where you were born, and then they write to the Medical School and they get your record there and your grades and then they maybe check up on you as a law-abiding citizen in each place wherever you have lived.

Q. Well, did you get your certificate after that probationary period?

A. Yes, sir.

Q. To practice in Texas?

A. Yes sir.

Q. After you got your license to practice in Texas, when did you go to Moore County, or Dumas?

A. I got here, let's see, I visited here to look about the place in February.

Q. Of what year?

A. Of '30.

Q. All right?

A. And I come back and moved in here on March 31st in 1930.

Q. All right, Doctor, have you been practicing your profession in Moore County and in Dumas ever since that date?

A. Yes,sir.

Q. Continously?

A. Yes sir, ever since that day; I have never practiced anywhere else.

Q. Was there a doctor in Moore County or Dumas when you got there?

A. There was a Reynolds, Dr. Reynolds, who had a little store had some of his drugs in what it turned out to be the Dumas Drug Store, That's where the Montgomery Ward Store is right now.

Q. How large was Dumas at the time you arrived there?

A. Well, I didn't have a very good estimation of it, but Chester Logue had been here a long time and he estimated about a thousand, I believe.

Q. At that time, when you arrived there, that's in Dumas proper?

A. But I do remember the automobiles; there were 12 Model "T" Fords in the county.

Q. Twelve Model T's. You were pretty familiar with Model T'S?

A. Yes, sir.

Q. You know there were twelve Model T's?

A. Yes, sir.

Q. Doctor, did you have a hospital in Moore County after you started practicing?

A. Soon afterwards, yes sir.

Q. Is it the same building that you have now?

A. No, sir, it is the one right south of it, across the alley.

Q. Was it a small building?

A. Yes, sir.

Q. Did you actually operate a hospital then?

A. Yes, sir.

Q. For how many years?

A. Let's see, that went up to August in '36.

Q. How many could you accommodate?

A. Four.

Q. Four patients, that was that small?

A. Yes, sir.

Q. And later, Doctor, did you construct the building that you now occupy?

A. Yes sir.

Q. What year was that?

A. I built that in, started in on it in '35 and ended up in August of '36. The first day of August, I believe, we started moving in some small--

Q. Has that been the only hospital in Moore County up until the time the new Memorial Hospital was built?

A. That's right.

Q. When was the new hospital built?

A. It was about '50.

Q. Then actually, since '30 up to '50, the only hospital facilities the County had was what you provided; is that right?

A. That's right.

Q, Did you have a staff in your second hospital?

A. In the second hospital I had a full staff.

Q. What did that consist of?

A. There was eight nurses and a technician.

Q. And how many beds (I think that is the way they classify hospitals) did you have at that time?

A. It was built for twenty-two, but we had room for twenty five there; I mean we had twenty five most of the time.

Q. Did you have a staff of doctors there at that time?

A. No. sir, there was, for awhile, Dr. Reed was in town and he stayed with me awhile and he did use the hospital even after he moved out.

Q. Is he a Dr. Reed who later came to Amarillo?

A. No. He got sick, I believe, when he left Dumas. That's how come him to leave. He got sick beforehand and he was not well and he didn't want to work and so he just kind of stayed around there all the time, and any hardships and things like that, why, then I did it.

Q. Have you ever gone on vacation at any time you been up there?

A. Never had a vacation in my life.

Q. Never had time to get married?

A. I had the time but I couldn't find nobody.

Q. Doctor, have you had any dependants of your own since you have been up there?

A. Yes, I took care of my father and mother from '28.

Q. Until ehen?

A. Until my father died this last year, and my mother died in '47.

Q. Your father died in 1956?

A. 1956, and buried him the first day of May.

Q. Did they live with you since 1928?

A. Yes, sir.

Q. You mean before you finished school?

A. No, no--you said '28?

Q. I thought you said '28?

A. No, '38.

Q. 38; I am sorry. In other words, they came to Dumas and lived with you since '38?

A. In '38 and '39.

Q. Now Doctor, since you have been there did you adopt a boy?

A. Yes, sir.

Q. How old is that boy?

A. He is ten years old the 10th of January; I believe that's last month.

Q. Ten years old?

A. Yes, on the 10th day of January.

Q. What year in school is he?

A. He's in the sixth grade.

Q. Did you go through court and get a legal adoption?

A. Yes, sir.

Q. Even though you are a single man and always have been; is that right?

A. That's right, He was born on the same day of the week and the same hour of the day and the same day of the month as I was born on.

Q. Well, what was he? An abandoned child by the parents or the mother.

A. Yes, sir, got stuck in a mud hole in car they had out there--

MR. BINION:

I am going to have to object now, I think we have got enough background, and I would like to get on with the case.

THE COURT:

Sustained.

Q. Since the new hospital, Doctor, you have not operated your hospital as a hospital, have you?

A. No. They hired all my nurses at that particular time and I didn't have any and I didn't feel like that I could go in competition with the Government, so I quit.

Q. Well, actually the town has grown quite rapidly up there?

A. Yes, sir.

Q. Do you know what the population is now?

A. I believe it's close to ten thousand, but I don't know.

Q. You are not saying that the hospital that you had would accomodate the city at the present time?

A. No, sir.

Q. It wasn't adequate, was it?

A. It wasn't able to accommodate anything like it.

Q. You have continued your practice up until the present time and you use your hospital for your office; is that right?

A. I use it for the office, and then in emergencies and any--there is lots of people, you know, that wants me to doctor them and they come there and I always take care of them, but I go over to the hospital for anything--

Q. You don't have hospital facilities any more?

A. No, sir.

Q. Are you on the staff of the new hospital?

A. Yes, sir.

Q. There has been some testimony here, that you heard, that you have been suspended from practicing?

A. Yes, I heard that awhile ago, and that come up in there and we--they talked it over, and since they hadn't any proof that I was over there, because I never took a picture with a Kodak, in my life, and I never had one under my arm or in my hand, I don't guess, except maybe in a store, and so they decided maybe I didn't take any picture and so they had a session and agreed if I had never taken a picture, that they would right me with the hospital, and when I left there that was the answer that they had.

Q. You never were probated or suspended?

A. No, sir, not that I know of.

Q. Well, just what were the facts on that?

A. Sir?

Q. Did you see this patient that the testimony has been about here this morning?

A. No, sir.

Q. I mean was there a patient that there was a controversy about?

A. I don't remember any controversy. Who with?

Q. I don't believe you understand my question, Doctor. What I am getting at is this: you say there was a discussion about you taking a picture of some patient?

A. Yes, sir, burned patient.

Q. Let me ask you, are you interested in burned patients?

A. Yes, sir, I have the only ointment in the world that's worth a dime for a burn.

Q. In other words, you perfected something, in your opinion for burns?

A. Yes, sir, twenty years. . .

Q. Did you see this patient?

A. Yah, I saw the patient.

Q. Did you get permission to see the patient?

A. I got permission. I went and seen the doctor and another doctor, too, was in there, and I got permission to go in, and he adjusted my cap and gown before I went in the door himself.

Q. You were merely interested in the patient because you heard it was a burn patient?

A. I was interested in the burn as a whole and it wasn't really particular to me who it was on. Since it was burned, I wanted to see the burn.

Q. Now, Doctor, getting down to March of 1956, I will ask you to tell the jury if you know, when is the first time you saw Mr. Spivak?

A. Well, at that time I begin to learn who he was exactly. Up to that time he had been in there at different times and he always come in with a bunch of people to be examined for C and R Truck Company, and he would, when they got a little breathing spell, he would tell me, "How do you like the number of patients I brought you this morning, the number of examinations?" and I said, "Well, that's just fine." And he always wanted me to know and impress me that he was doing a lot for me and I hadn't paid him--

Q. With reference to March 2nd? What day are you speaking of now, with reference to March 2nd?

A. Before March 2nd he had been in there several times but I didn't know who he was.

Q. You heard his testimony as the first witness for the Government?

A. Yes sir.

Q. Wherein he stated that he saw you, I think it was, on the 2nd day of March; is that correct?

A. Yes sir.

Q. I will ask you if you had any conversation with Mr. Spivak--

A. The conversation's somewheres within that time but I don't know the date, but I did get a copy of the prescription that I had written, and that said the 2nd and the 3rd and the 5th day of March, and he come in there at that particular time and said he was an ex-service man and he had taken medicine, he was a medic.

Q. You are talking about March 2nd?

A. Yes sir, March 2nd is when--but I don't remember just exactly that time except from that prescription.

Q. I will ask you whether or not on the 2nd day of March if you gave Eugene Spivak a prescription?

A. I have no way to identify the time and the place except in the first part of that month he had approached me, as a medic in the Service and he wanted to take some training under me and understand something about my drugs. That's the first time I ever remember him. And I didn't remember his name until the 21st day of March--I mean that's the next time that I recognized him that I knew he was the same man.

Q. In other words, it was the 21st of March before you recognized him being the same one you had seen before?

A. Yes, sir. But I knew then I had seen him before and we had talked and he identified himself to me.

Q. Well, now, do you recall independently of ever giving him a prescription, I mean independently from anything that

you have received since then?

A. I have no recollection of ever giving him a prescriptior up until the 21st day of March, and then from then on I knew him too well.

Q. All right, Now, after being apprised of this Charge, did you check with your prescription shop?

A. Yes, sir, I checked all of them after this come up, It was already in session and I had already been down here and--

Q. As a result of that investigation, did you go to the Morris Prescription Shop to check to see whether you gave prescriptions to Mr. Spivak?

A. Yes, sir I did.

Q. As a result of that, did you get copies?

A. I did.

Q. Copies of that prescription?

A. Yes, sir, I did.

(Marked Defendant's Exhibit Numbers 7 and 8 for identification.)

Q. First, Doctor, I will hand you Defendant's Exhibit #7 and ask, first, that is not the original prescription, is it?

A. No, sir, it isn't.

Q. How did you acquire this subseqent to this Charge?

A. I went over to Morris' Prescription Shop and I asked him if he had any prescriptions that I had given to someone on Dexedrine, and I gave him the name as this Spivak. But he didn't know how to spell it and I didn't know how to spell it

so he copied this off of his prescription.

Q. In other words, this is a copy by the pharmacist?

A. Yes sir. The original is up there anytime they want it.

MR. MCCARTHY:

We ask this be introduced. Do you have any objection?

MR. BINION:

I don't suppose so. Do you?

MR. FLOORE:

No.

Q. Now, what is that prescription for?

A. That's dexedrine-sulfate, and it's tablet; 9a.m. and 1 p.m.

Q. Tablet what?

A. To be given at 9 o'clock in the morning and 1 p.m. in the afternoon and not later than that.

Q. Does it show the quantity on that anywhere?

A. No, it doesn't show the quantity because, the reason I didn't do that, Dumas had been in such a shape that,--I mean had not had enough pills to fit everything, so I write it like that and if there is anything comes up, then they call me at my store and I can tell them--

Q. You had nothing on quantity when you issued the prescription; is that right?

A. I had the quantity of the tablets but I didn't have the quantity of each tablet.

Q. You had a five-milligram tablet; is that right?

A. Well, he could put five or ten; I didn't know which one

he had.

Q. Where is it on that prescription where it shows the quantity?

A. "50" right there.

Q. Fifty?

A. Fifty pills, Now with this left open that gives him a chance to either put it down as five or a ten-milligram, which ever one he has. And if there is any question, he calls me.

Q. And it was dextro-sulfate?

A. Yes, sir.

Q. That was on the 2nd day of March 1956?

A. That's right.

Q. Now, Doctor, I will ask you whether or not--that's with reference to Defendant's Exhibit #8--is that the same type of prescription except that's for a quantity of one hundred?

A. That's correct.

Q. What does it show as to when it was received?

A. It was received on--

Q. I mean, how many capsules were taken?

A. One hundred tablets.

Q. Does it show how many was actually received according to that prescription?

A. Yes, it says dispensed only, twenty-six tablets.

Q. Does it show how to use that?

MR. FLOORE:

May we see the date on that again?

A. T-i-a-d-c, three times a day before meals and not to be

taken after 4 o'clock.

Q. What was the date? What is the date that it shows the prescription was filled?

A. Ordinarily don't have any date on them except the one that the doctor puts on them and seldom ever--

Q. What day do you have on there, Doctor?

A. On the third month and fifth day and '56.

Q. That would be March 3rd, 1956?

A. Yes, sir.

Q. What did you say were the directions?

A. Three times day, and he had taken them before and knew what they were, and my advise was never to take one after 4 o'clock.

Q. What does that show on that second one?

A. This shows it is written for one hundred Dexedrine-sulfate tablets and the directions on there, T-i-d-a-c.

Q. What does that mean?

A. That means three times a day before each meal. He dispensed twenty-six tablets and it was on the 3rd fifth and '56;

Q. Now after this prescription was filled, the bottle or the container, do they use that T-i-d-a-c on the container, does the drug--

A. They spell that out.

Q. That's just your abbreviation?

A. Yes, sir; The druggist puts that on there in English, I guess you would call it.

Q. Now Doctor, with reference to this man here, Mr. Spivak, can you tell the jury whether or not; prior to the issuing of the prescription, whether it be this individual or another, for either what you call Desoxyn or amphetamine drugs, do you make any physical examination before administering it?

A. Yes. He come in in March--I knew him before--and he wanted to stay there and take some work under there and study some drugs, and he wanted to know how to take a blood pressure and he wanted to know if I could tell anything about a blood pressure without a machine, and I was teaching him how you could do that, and so with just a trial, I put that on there to show him how it worked and how his pluse was, and then I made it clear to him that anyone walking in the office or place, where you could see them, I showed him how you could look at a cheek and see if it was high blood pressure becuase that will be bleached out, and I would just show him some of the fancy short cuts that a doctor could have.

Q. Now, did you take this man's blood pressure?

A. Yes, sir.

Q. Did you take his heart beat?

A. I did by pulse. I didn't with a stethoscope. I just took his pulse.

Q. Pulse beat?

A. Yes, ir.

Q. Can you take the blood pressure from the pulse?

A. Yes, sir.

Q. How do you do that, Doctor?

A. You can close down the beat or the--in other words, you can feel it on the finger, on the distal finger, and then you let that up; when the blood comes back you can feel it hit; and that's the diastolic, and the pressure you put on there would be the systolic, and you can do that often enough until it is very little change between--I mean you take it and then you do that, you can tell; and if it's over the normal, say up to 182 to 220, why, then of course I wouldn't think about trusting anything but a machine.

Q. In other words, where it's evident from your preliminary examination that there is a cardiac condition or high blood pressure--

A. That's right.

Q. --Then the machine is more accurate?

A. That's right.

Q. Let me ask you this, Doctor: by your method of pulse examination for blood pressure to determine whether or not it is high or abnormal, can you tell by that method whether you be out in a field or whether you be in your office or whether you be in a hospital as to whether or not a person has a normal condition or whether it's a serious condition?

A. Instantly.

Q. Instantly?

A. Yes, sir.

Q. In other words, you could do that without what is known as the pressure method?

A. Yes, sir.

Q. Or mercury method?

A. That's right.

Q. And you can tell that?

A. Yes sir.

Q. How near accurate is that from the mercury method?

A. I would say it wouldn't miss five points up to 180.

Q. Beyond that, where it is a serious condition--

A. I don't trust myself any. I get more definite.

Q. Is that a common practice any more, Doctor?

A. Yes, sir, I believe it is common. It is with me at least. And if there is any question or anything or an examination where it has to be wrote down, why, then I always use-- I always check them first and see how near I come to it, and then I use the machine and check myself and them too.

Q. Now you say you did take this man's blood pressure?

A. Yes sir, for practice I did; he didn't come in for an examination but he wanted to know how I did it.

Q. What did Mr. Spivak tell you he was doing?

A. He said that he was a driver of a truck and he had a parnter somewheres on a tractor(they call a truck a tractor) and at that particular time he was in town resting up, seemed like.

Q. His partner?

A. No, he was. His partner was out on the truck somewhere.

He wore a cap and all, just like the C & R. Truck people did, and he come in with the people.

Q. How many times did you see him before March 2nd. or do you know--I mean actually to identify him?

A. I couldn't identify him until after I had seen him, but I saw him several times.

Q. And did you do work for the C & R Truck Company?

A. Yes sir.

Q. All their drivers?

A. Well, most--all they sent to me, I'll say that.

Q. Do you recall this man coming to you and asking for some amphetamine tablets or Desoxyn or some type of drug?

A. Yah, he would come up there and while I would be examining anybody or anything, why, then, he would go up through the hall and look in the doors and the closets and then he began to ask me all kinds of questions about medicine, which I enjoyed, because I thought I was helping out an ex-service man and you know, they don't get much help.

Q. Did he ever ask you for some prescriptions?

A. Not up until this March.

Q. This March 2nd?

A. Yes, sir.

Q. That's the only time he discussed it with you?

A. That's the only time that I remember.

Q. Do you recall what was the reason for him wanting it on that occasion that he told you?

A. I didn't understand.

Q. Do you know why he told you he wanted it on that occasion? Was he in any trouble?

A. Yah. Yah, he was going to leave and go wherever this truck was and he wanted a few pills to take and use along as he seen fit for his ownself, and he was a medic and he had used pills before and he had tried out dextro-amphetamine sulfate but he wanted the Dexedrine?

Q. Dexedrine?

A. Yes, he said dextro-amphetamine sulfate did not serve the purpose like Dexedrine and Benzedrine.

Q. And that's when you gave him a prescription?

A. Yes, sir.

Q. Did he ever tell you whether or not he was married or had a family?

A. Yes, sir.

Q. When did you first learn that?

A. I learned that on the 21st of March.

Q. 21st of March?

A. Yes sir, '56.

Q. Was that some two weeks after or three weeks?

A. Yes sir.

Q. What was the occasion for your learning about it then?

A. Well, he come in my office and I was busy, he waited out there a little bit, and when I caught up, why, he come in there and he says, "I'm back again." I said, "Well, fine." And he said, "I'm in a little more trouble this time, though." And I said, "Well, divulge it, whatever it is."

Well, he said, "We have wrecked our truck down in the south part of the State," he says, "And I had my wife and three

children with me," and he says, "You are going to have to help me out a little bit", and I says, "Okay, What is it? Financial or something?" And he said they just come in, didn't have any room to go to and they were somewheres up in the C & R in the garage or something, or some place up there, but he didn't tell me exactly where they were located.

Q. Did he tell you what his family consisted of?

A. No more than three children and a wife.

Q. That's what he told you?

A. Yes, sir.

Q. What else was said there at that time with Mr. Spivak and yourself, Doctor?

A. I asked him, did he want money, and he said no, he would rather have a room and some food. So I was tickled to get to do something for him if he was really in that tight, so I called Mrs. Betty Simmons and told her to come in there and talk to him and that he would want something to eat and see if we had any bacon and eggs or ham and eggs or something, whatever he wanted, and I said, "Get whichever he wants." And we ordinarily, now, don't keep a supply of stuff since the hospital broke up and we just go to the grocery store and get whatever we need at the time we want it.

Q. At that time did he ask for any amphetamine drugs?

A. No, he didn't. That was about 11, between 11 and 11:30.

Q. Did he tell you he would be back?

A. Yah, he said he would go get the wife and his children and bring them up there and he talked to Betty about fixing him

a room and a bed.

Q. Did he come back that night at all?

A. He waited about two hours, I guess, and come back somewhere between 1:30 and 2o'clock.

Q. Were you awake or asleep?

A. That was in the afternoon. I was there working.

Q. The next day?

A. That same day. He was there at 11, between 11 and 12, when he just got in.

Q. That was in the morning?

A. That was in the morning, a. m. and he just had got in he said, just got into town. When he went back to get his wife and his children, then he told Betty, make arrangements there for the food, and she was to fix him a room, and he left then and said he would go get the wife and the children.

Q. And he did come back, you say?

A. And he come back about 1:30 and said, "Well," he said, "Doctor, I have had some good luck." I says, "Fine."

He said, "C & R. people is going to give me transportation money and traveling expense," and he said, "I can just put the wife and the kids in this truck," and it had a bed in it, and he said, "We won't need a thing," and "We, will just drive on."

Then he wanted to know if I would give him a prescription, so I did give him a prescription that day.

Q. Do you know anything about whether that was ever filled?

A. If it was--I have looked all over Dumas and I couldn't find it any place.

Q. That was on the 21st of March?

A. 21st day of March.

Q. Do you have any independent recollection about that particular prescription, Doctor?

A. Well, I did after all this happened, after the 23rd, then I could connect it back up pretty easily because it was just a short time.

Q. How many druggist are there in Dumas?

A. Well, I would say there is three, and possibly five.

Q. Well, could this prescription have been filled at any one of those drug stores?

A. Any drug store in the State of Texas, I guess, would fill it.

Q. But you haven't been able to locate whether or not that was filled or not?

A. I called them all and they couldn't find it, but they would look again and they would call me if they found it, and they never did call me.

Q. But is that the extent of the prescriptions you gave this man?

A. I gave him one on the 22nd.

Q. On the 22nd?

A. Yah, he left on the 21st and he come back about 1 o'clock around 1 o'clock on the 22nd and thanked me very much--he said he made the trip and the children was fed and they were

warm and he was going on another trip and he wanted another prescription, and I gave him another prescription.

Q. Then you had given him three altogether?

A. I gave him two that I have there and I gave him one on the 21st and one on the 22nd.

Q. Then the two here were on the 2nd and 5th of March?

A. That's right, that made four that I know of.

Q. Have you ever found the others at all?

A. Never have found them, no sir.

Q. Now, have you ever given or sold or bartered any other amphetamine or Desoxyn or any type of drug to this man here?

A. No, sir. I would be ashamed of myself as long as I live if I had--a man down and out like that.

Q. Did you ever receive to your knowledge any money from Mr. Spivak?

A. He was kind enough to offer me a dollar, and I says, "Why certainly not." He says, "Well, fifty cent?" And I said no. I said, "You take it and get on out of here." and if the money was ever exchanged, I have no clue to it.

Q. Well, could you have gotten a dollar and fifty cents, Doctor?

A. Yah, I could have got it, I guess, because he offered it.

Q. That's the reason--with reference to these exhibits, there is this figure of one dollar and a figure of fifty cents, fifty cents on Exhibit #7 and a figure of one dollars on number 8. I will ask you whether or not--I presume-- is that the number --does that have anyghing--

A. That's the tablets. That's the number of dex-sulfate tablets. This here is one hundred (indicating).

Q. That is the number of tablets?

A. Yes, sir, that's the number of tablets.

Q. It has nothing to do--

A. Has nothing to do with--

Q. Then you don't recall receiving any money from this man?

A. I recall that I didn't receive any because I wouldn't take his money.

Q. Then I mistake that 50 and 100, that refers to 50 tablets and a hundred tablets, is that right?

A. Yes sir.

Q. Then so far as you are saying now under oath, you never have received a dime of this man's money?

A. Not a dime from Spivak because he never did have any money when he was in there and he was always broke.

Q. At least he told you--

A. And he was always griping because he had to work.

Q. What kind of clothes was he wearing when you saw him?

A. He was wearing about the usual routine that the C & P Truck people wore and he had a little cap on; it had a hard bill to it; the body of the cap was just very thin cloth and he had some kind of figure up there that looked like a "B".

Q. What kind of clothes did he have on?

A. I couldn't say, except they were, showed to have alot of abuse on them and his shoes were heavy shoes and had oil on them.

Q. Now you heard a lot of testimony here, particularly yesterday, Doctor, with reference to the 22nd of March or the last day that you say Spivak, March 22nd and March 23rd. Did you see these men on the 23rd--Mr. Spivak?

A. I sure did.

Q. Now Doctor, where did you see Mr. Spivak on the 23rd of March?

A. Well, I was working just a little bit and I went out the door and I saw him standing there in the hall.

Q. In the hall?

A. Yes sir, in the front part of the office, but he had already come through the waiting room and was standing there, I thought maybe looking at television, but I don't know, but that's where he was standing, and so I asked him--

Q. Was there anyone with him?

A. There was no one with him, I invited him in.

Q. Do you remember what time of day that was?

A. Yes, sir, it was close to one o'clock.

Q. One o'clock in the afternoon?

A. Yes, sir, one o'clock in the afternoon.

Q. When, if ever, did you see Robert Keating, whether you knew who he was or not?

A. Yes, sir, that was on--that was about 1:30 or a little bit later on the same day.

Q. Now before you saw Keating, did Mr. Spivak leave or stay there?

A. Mr. Spivak,--come back on this second time--you see, he

went off there at about 12:30, or whatever that time was he left out, but he told me that he thought he would leave then, and when he come back then in about thirty minutes he said "Well, I am having some more good luck"; said, "My partner come in and brought the truck. I believe we both got a job."

He said, "I would like to have some more tablets. I says "Okay," but I says--he had already told me he went all over town and he couldn't get them filled on the prescription that I had before and he only had a small amount. And I said "Well, I don't have anything but dextro-amphetamine sulfate." He said that dextro-amphetamine sulfate was not good for him, and he was a medic, and he had used it lots of times. So I said "Well, that's all I got. I says, "I am sorry."

He started out and he said, "Well, I'll tell you, you just give me a dozen of them anyhow. I can't get nothing else". So I give him a dozen; I had it right there in a closet beside of me. He took this dozen and he left out.

Q. That was the sulfate?

A. Yah, he had that sulfate and he left out to get his partner, to bring him in to introduce him, and he was a pretty shabbily dressed man at that particular time.

Q. You are talking about Keating?

A. I am taling about Spivak.

Q. He didn't look like he is today?

A. No. His hair was a lot longer than it is now and he didn't have a clean shave; his beard was out some.

Q. All right?

A. He lookek like a pretty hard customer.

A. Then he went out and he returned with Keating?

A. With this Keating, yes sir, and when he come in, then I was standing there by the table, and he said, "This is my partner," and he said, "Robert" I belicve but I can't remember what--

Q. Do you remember hearing the name "Keating" at all?

A. I did after this thing started up a little bit. Then I asked him again what his name was. Sometimes it seems like I don't hear as good as I ought to, so I asked him his name afterwards, and he thanked me highly for taking care of Mr. Spivak.

Q. Just tell now in your own words, and as briefly as you can, Doctor, everything that occurred in your office there between you, Mr. Spivak and Mr. Keating up until the time that Mr. Keating arrived, and until he left?

A. Well, they both knew that--I mean Spivak knew that I was going on a call, fixing to go on a call, when he come back. So when he was introduced there, why, then this Keating said, thanked me for taking care of his partner (they were partners in this truck business) and I said, "Well, not at all; Anytime I can favor you, why, I will do it." And I had already been told by the C & R people to take care of their men, and I thought they were.

And Keating said, "How about giving me some pills you gave my partner?" I said, "No". He said he was going to Mexico,

and I says, "You have got enough pills there to last you to Mexico." He says, "Well, why don't you give them to me?" He said, "Don't I look as good as him?" And I said, "Yah, you look all right." And I asked him, I says, "Would you okay this man?" And he said yes, he would okay him. I said, "Well that's fine. I am glad you fellows are getting along so good."

Then he said, "Well, are you going to give my those pills." And I said, "No, you have got enough to get you to Mexico", Then he told me they could buy them by the bottle and wanted to know if I wanted them to bring some back, and I said no I had all I needed at that time.

Then after that, why, this Keating guy, he said "Yah," he said, "You'll give us some pills, and I said, "Well, I don't know if I will," and he says,"I'll see that you give them to me."

He says, "I can take any of these pills you have got or go through your house, any drug store, any hospital or truck," he said, "I can even find a truck out on the road."

I said, "Well, that's fine. A man has that much authority ought not to be asking me for something." I said, I'll wait on the poor."

He said, "Well, you get them pills and give them to me." And I said, "No, I won't be a doing that, I know" and so he said, "Yes, you will, " he says, "I can shoot you down right here and there won't be nothing said about it." Says "I have got more power than the U. S. Marshal."

He went towards the door then and put his hand on his pocket like he might have something, and for some cause, and then when he done that, the door was kind of open just a little and he put his foot around this door and he said, "You are not going to get out of here," and I said, "Well, I can take care of myself inside," and we got pretty boisterous, all three of us.

Then he said, "I've got something here to show you." Well I said, "It wouldn't do you any good. I wouldn't get you the pills anyway." So he pulled out something out of his pocket and held it in his hand, one hand, and his other hand on his hip pocket, but whatever it was, I was in no humor to look at anything he pulled out. And I said, "I don't have my glasses." He said, "Well, get your glasses on ". And I told him, "No."

And we just kept getting worse, and at that particular time the telephone rang , and I says, "There is my telephone." and Betty come to the door and said they wanted me on the telephone.

Well, I didn't know she was coming to the door, but at the same time she came to the door to push it open, I got a-hold of the knob and pulled it open and that pulled it loose from his foot and then I started on out of the door at that time and we were still up in a pretty much uproar; I was upset, to be trapped, so I answered the telphone. When I come back, well, then she was standing there in the hall trembling and shaking and carrying on like there was going to be some

trouble, and so when I come to the door, then they both walked out and as they walked out and walked down the hall, they says, "Well, you needn't call any sheriff or needn't call the police." He says, "We have already seen about that." He says, "The Sheriff is out of town and the deputies are not in the office," and he said, "The Chief of Police is out of the office," and he says, "You couldn't get nobody if you called them."

I said, "Well, you have taken care of everything nicely haven't you? And he said, "Yah, we do that." And so he went out, they went on out there.

But at the time that the big ruckus was, when this door was being held so fast, I asked Spivak, I says, "Have you been a staying here in Dumas all this time?"

"Why", he says, "Certainly not." He said, "I wouldn't stay in one of your ratty hotels. I'm staying down in Amarillo". He says, "We go down there and have wine, women and song, and the Government pays for everything."

Q. Let me ask you this, Doctor, did they ever identify themselves to you?

A. They never did.

Q. As Government men of any kind?

A. No, sir.

Q. Undercover men?

A. They never even mentioned it until after this bout started.

Q. Did they ever tell you then they were Government men?

A. Keating tried to tell me, or was telling me something, but I didn't listen to it; but Spivak, he stayed in the back, back over by the stove, and he represented hisself as just a mere helper for--he was kind of flunkie for Keating.

Q. When did you actually learn, or did you ever--when did you first learn, if you did learn it, that they were agents for the Food And Drug Administration?

A. When I come out to the door, then I saw this piece of paper laying on my table and I looked at this piece of paper and they had got all the way down to the hall, and I came back down to the door and said, "Did you write this?" And they said, "Yes ", and they said that was their ticket to show me what they were. And I said, "Well, you was a long time about it," and we just kept--

Q. Was that the last time you ever saw them?

A. That was the last time I ever saw them until, I believe it was, yesterday.

Q. Did you ever given them any of the three bottles or sell them any of the three bottles?

A. No, sir, Spivak, he had already come in and asked me where I kept my medicine. And I have two places, and I keep full ones low down because I am too lazy to bend over, and I keep the broken bottles higher up so I don't have to bend over. And I take them myself, I have taken them for seventeen years

(Marked Defendant's Exhibit #9 for identification.)

Q. Doctor, I will hand you Defendant's Exhibit #9 and ask you to state whether or not that's the interior of you private office?

A. It is the interior of my private office.

Q. Now, has there been any material change in that since March of 1956?

A. I would say there is no change whatsoever, except the stool may have been moved a little bit, but nothing else has been moved, because the other chair, you can't move it, and the rest of them are just like they were.

Q. Now, we would like to introduce this.

In this photograph, Doctor, on the right side there appears

A. Facing the window?

Q. On the right of the window there are cabinets?

A. Yes, sir.

Q. There are cabinets on both sides?

A. Yes, sir.

Q. There are lower cabinets on one side and higher cabinets on the other; is that right?

A. Correct, yes, sir.

Q. What are those cabinets used for, basically?

A. At the time of running it for a hospital, this had a lot of emergency instruments on this cabinet. It's all glass-fronted up. The other cabinet was just a supply cabinet.

Q. That was for you hospital originally?

A. Yes.

Q. On March 23rd or in March of 1956 what were they used for?

A. Well, they were used then as any surplus medicine or any surplus cotton, alcohol--in other words, it's just the provisions I use every day.

Q. Now you have examined these and seen these and heard the testimony about these three exhibits known as Government Exhibits 1, 2 and 3?

A. Just from my seat over there, yes, sir.

Q. Doctor, how do you purchase your amphetamine sulfate or chlorides?

A. Well, the particular way that I use is the fact that they send in a lot of, they will send in the fall, winter and summer and back in the fall, circulars, and then when I want anything like that, I go look over these circulars and use the one that costs the least amount of money.

Q. Well, now do you buy them direct from some laboratory?

A. I buy them direct from the place and send them a check so they pay all the expenses.

Q. In other words, you buy them in bulk lots or bottles like that or larger; is that right?

A. That's right.

Q. You heard testimony here that you can get them as high as fifty thousand?

A. Yes, sir, if you had the money, you could get a hundred thousand.

Q. They are not too expensive, are they?

A. They cost, by sending a check in, they cost about eighty cents a thousand.

Q. A thousand?

A. Yes, sir.

Q. Is there any variance in the price, Doctor, between 5-milligram or 10-milligram?

A. Yah, there is about, runs from twenty-five to fifty cents.

Q. Per thousand?

A. Per thousand, yes, sir.

Q. Actually then a thousand would cost about a dollar or a little better?

A. Five-milligrams would cost you about, between eighty and ninety cents.

Q. For a thousand?

A. For a thousand, and that's five.

Q. And ten?

A. Ten would cost you about a dollar and ten or fifteen cents.

Q. That's for a thousand?

A. Yes, sir.

Q. Do you occasionally buy them at that price, buy them in thousand lots?

A. Yah, I buy them that away because you can ge them so much cheaper. And I have taken them since 1940 for myself. I have taken them seventeen years and I will take on the average of oh, anywheres up to 500 a month.

Q. Yourself?

A. Myself, yes, sir.

Q. And how old are you, Doctor?

A. I am 63, I guess, 64.

Q. Now, did you keep an inventory of your drugs up there?

A. No, since the hospital is out, I don't keep an inventory because I just have an office and no one in there but me.

Q. You have no one to account to but yourself, is that right?

A. That's right.

Q. And you do not keep an inventory of your drugs?

A. No. sir.

Q. You do on your narcotics?

A. Oh, yah, on the narcotics I do, yes, sir.

Q. Well, now, your narcotics, are they kept separately and apart from any other drugs?

A. Yes, sir.

Q. Are they under a safe?

A. I have them in a combination lock, except what I have in my pocket; I always have some in my pocket.

Q. Under a combination, you say?

A. Yes, sir.

Q. Now, Doctor, where in the hospital do you keep your bulk or your bottles, unbroken bottles, of amphetamine-sulfate or hydrochloride?

A. On the right-side under the cabinet, on account of I don't go there very often.

Q. Show us in this picture where, if you had a supply of these bottles at that time, where they would be?

A. They would be under this cabinet here by the sink (indicating).

Q. Do you keep any of your supplies other than what you said

about your combination lock for your narcotics, do you keep any medical supplies or medicine anywhere else other than within your office?

A. That's right.

Q. Are they always in there?

A. They are always, unless they come from the postoffice and I haven't had time--

Q. Where would they be then?

A. They would be out on the desk out in front.

Q. In the reception room?

A. In the reception room where the parcel postman comes in and sets them down.

Q. Is it your testimony, Doctor, that you have never kept, or in March of 1956, that you had no drugs of any kind except in your private office, unless there was something out in front that would have been delivered?

A. The morphine.

Q. You keep it under combination lock?

A. But I have that in the hospital, yah.

Q. But all your other drugs that you might administer to patients or would give them at the time, are kept within your office?

A. Yes sir.

Q. And they are kept in that cabinet; is that right?

A. Yes, sir, one or the other of those cabinets.

Q. Now, Doctor, you are charged with violating the Food and Drug Act, and under the testimony here by Mr. Spivak, that

you wanted to be friendly. I will ask you, Doctor, in the entire time that you have been practicing privately as a physician in Dumas, since 1930, have you ever from a mercenary or monetary standpoint sent out a statement to an individual that owed you an obligation?

A. Not to an individual, no, sir.

Q. Ever?

A. Never, that I remember of. If I did, I don't remember it.

Q. Have you done a great deal of charity work or not, Doctor?

A. Yes, sir, I have a sack over there that is just full of part of a hundred thousand I done in '49 and '50.

Q. Now, there is some innuendo here that you had some land up in Moore County. Do You?

A. I have an equity in a little bit of land.

Q. How much acreage do you have?

A. Well, let's see, there is about a thousand acres that I have equity in.

Q. How much do you owe on it?

A. I owe in the neighborhood of $13,000.00.

Q. Have you made or lost money on it?

A. I have lost money on it, lots of money.

Q. Lots of money?

A. Yes, sir, all that I made, I put it in there.

Q. And do you operate it yourself? Do you have equipment out there?

A. Hire it done.

Q. Do you have any of your own equipment?

A. Yes, sir, I have equipment.

Q. But you hire the work done; is that right?

A. Yes, sir.

Q. And where is that from Dumas proper?

A. I would say, like the crow flies, it's nine miles north and west of Dumas.

Q. Now, Doctor, with reference to these drugs known generally as Dexedrine, lots of times--aren't they?

A. Yes, sir, Dexedrine and--

Q. Whether sulfate or hydrochloride. Do you say you use them yourself?

A. Yes, for seventeen years.

Q. Do you prescribed them quite often? Do you prescribe them?

A. I prescribe them, yes, sir.

Q. What do you prescribe these drugs for?

A. Obesity is the greatest thing that I do, but I do for anybody that comes along maybe that might have some other trouble-- oh, alcoholics, I give an awful lot to alcoholics.

Q. Alcoholics, You do have some in Moore County?

A. Alcoholics, yes, sir, a lot of them.

Q. And do you ever use the injection?

A. If I am called out to a patient and he's down maybe on his porch or house and I don't want to wait for the pills to act,

I can give him an injection of Dexedrine.

Q. You do that?

A. Yes, sir.

Q. Do you carry them in your medical bag?

A. Yah, bag or hand.

Q. In other words, if a man is passed out, for example, from alcohol, you do, rather than give the capsules, you would give injections; is that right?

A. Injections, yes, sir.

Q. Do you actually recommend it and prescribe it for people that are overweight?

A. Oh, sure, yes, sir.

Q. Are you an example of it yourself?

A. Yes, sir, 285 pounds.

Q. You weighed 285?

A. Yes, sir.

Q. And how do you take those now, Doctor?

A. I was raised on a farm and I get awful hungry for breakfast, and I try to take one before breakfast, and try to cut down on that, and one in the middle of the morning and one before lunch, and then I will take one at 1 o'clock and ordinarily one at 2 o'clock, and then if I am not pretty well saturated, I will take another one between 4 and 5.

Q. What size capusle?

A. I usually take 10 now, I used to take 5.

Q. Do you find any ill effects?

A. No ill effects whatsoever.

Q. Does it prevent you from sleeping?

A. I guess it would prevent me from sleeping if I had taken one after 5 o'clock, but since I have been coming down here I have never gone to bed before 12 o'clock, I guess, hardly half a dozen times in my life.

Q. Let me ask you this with reference to the drug itself, assuming you took a 5-milligram or 10-milligram at 1 o'clock in the afternoon, like I notice where the prescription recommends three after meals.--

A. Yes, sir.

Q. --how long would it be before the entire effect of that amphetamine would be worn off and the person would become normal again?

A. Between five and six hours.

Q. Now, actually how does it affect a person, a normal person?

A. There is practically nothing that you notice except if you want to drink, you don't mind getting up and go get a drink, or if you are out anywhere, you don't mind walking across the street, or if you have to make a few extra steps, you don't mind to do it--you feel like it.

Q. In other words, does it give you more energy?

A. Yes, sir.

Q. And have you had many patients or a few patients that you have treated for overweight up there in your country?

A. Yah, I have quite a few overweight patients.

Q. Do you tell them how many to take a day?

A. Yes, sir.

Q. Do you often dispense those, Doctor, directly from your office?

A. Yes, sir, I usually do a lot of the times because here is the thing of it: in this town you can't get dextro-amphetamine sulfate and you have to buy, at the drug store you have got to get Dexedrine or Benzedrine, and they are so terribly high.

Q. Well, you heard the testimony here about the variance of prices?

A. Yes, sir.

Q. Do you sell this or does that go--

A. No sir, I never sell them. I just usually talk it over with a patient and check them enough--the urinalysis, and then I feel the pulse and I usually use a box like this (indicating) after I have told the patient what, how it might affect him and what to look for and how to judge hisself. And then at first they don't know what it's all about so I write out the directions for them at first, and then if they bring back a box or I have to give them prescriptions or something, I write that on the prescription, but the box has usually got it on when they come back.

Q. Doctor, with reference to the--how long do you say you have been prescribing this drug?

A. I begin in '40 after I left New York-Post graduate school of Medicine. I went up there when I was sick, I was sick for a year.

Q. You went to Post-graduate work in New York City?

A. Yes sir.

Q. What year?

A. That was in '40.

Q. And after that, did you learn about the drug there?

A. Yes, sir.

Q. Since that time, since 1940, since your post-graduate work you have been using it yourself and prescribing it?

A. Yes, sir.

THE COURT:

That's about three times that has been gone over.

Q. All right, Doctor, this question: I will ask you whether or not in your seventeen years that you have been using and prescribing this drug, can you tell this jurty of any serious effects that you know of from any of your patients or yourself as a result of its use?

A. Yah, gentlemen, I have been practicing medicine in Dumas for twenty-six years, and I was educated a lot of times under my uncles, and in this time I have give every kind of medicine--

MR. BINION:

Your honor--

Q. The question was, Doctor, whether or not during the seventeen years that you have administered this drug, if you can tell the jury of one instance where the administering of this particular drug, whether it be sulfate or the other, has caused harmful effects to any of your patients, that you know

of?

A. There's never a single time that it's ever been of any consequences where they had to call me or say anything about it. I have never seen any injuries of any kind.

MR. MCCARTHY:

That's all, Your Honor.

(Thereupon, at 5 p. m. an adjournment was taken until 9:30 o'clock, Wednesday, February 13th, 1957.)

February 13th, 1957

THE COURT:

All right, proceed with the cross-examination.

CROSS-EXAMINATION

BY MR. BINION:

Q. Dr. Brown, when is the first time that you saw Inspector Spivak, this man right here? When is the first time you ever saw him?

A. To know him or see him?

Q. To see him?

A. Well, it was sometime after Christmas, 1956.

Q. What is your best guess about it?

A. Well, the best guess would be the first of March.

Q. Where was he when you first saw him?

A. In my office.

Q. What was he doing there?

A. He brought in some truck drivers to be examined, he told me.

Q. Well, were there other people with him at the time?

A. Yes, sir.

Q. Who are those people?

A. Well, they are the ones to be examined.

Q. Well, who were they?

A. Well, I don't have their names. They were from C & R Truck Transport of Dumas, and the man that had the opportunity to send them up there was in Big Springs.

Q. You don't have their names and you can't tell us who those are?

A. No. sir. I examined the men and turned in the sheets and they only allowed me one sheet and I didn't keep them down.

Q. Now, that was on March what? March 1st.?

A. Yah, on March 1st, sometime along there.

Q. Was that the time that you prescribed those tablets for this man?

A. Well, that is the month in which I found the prescription and I did prescribed and write prescriptions for the gentleman at that time, but it was just a passing event and I didn't keep it in mind until after I had the prescriptions.

Q. What did you prescribe this man? What did you prescribe those tablets for?

A. Well, sir, he said he had been worried with the trucks and he had worried with those people and he was very muchly depressed and he didn't want to go to sleep that day on account he had been up at night, and he asked me, would I help him along a little bit, and so I told him, looked him over, and I asked him, I says, "You are mighty young to start taking

those to keep awake," and things like that. And I checked his, just caught a hold of his hand and checked his pulse, and of course I could see he was not of hypertension type.

Q. Why did you prescribe it?

A. Well, simply because that they--he wanted the pills, and that he was depressed and he wanted to stay up that day, and I didn't see anything wrong in that.

Q. What do you consider the normal dosage of this drug, amphetamine?

A. Experience or by book?

Q. I am asking you your opinion?

A. My opinion is, you can give up as high as 30 milligrams at one dose without--

Q. How much a day?

A. You can give anywheres from, say, 25 to 50 a day.

Q. For one person?

A. Yes, sir. Took them myself; that's the reason I know.

Q. How many have you taken today?

A. I would say fifteen.

Q. Already today?

A. Yes sir.

Q. How many did you take yesterday?

A. I believe I had taken fifteen yesterday. I take them every day, mostly.

Q. Now then, you told us yesterday, Doctor, that at one time you were taking the 5-milligram tablets, is that right?

A. That's what they come in, five.

Q. And now you are on the 10-milligram tablets, is that right?

A. Heavy exertion or anything, sometimes I take as much as ten at one time.

Q. I am talking about the tablet?

A. Tablet, 10-milligrams.

Q. You originally was on 5-milligram tablets?

A. Yes, sir.

Q. Now you are on 10-milligram tablets, just twice as strong as the five?

A. For more exertion--

Q. I didn't ask you about that. Listen to my question, Doctor and we will get along.

A. Okay.

Q. You used to take 5-milligram tablets and now you are taking 10; they are twice as strong as the five; is that right?

A. Ten is twice five, yes, sir.

A. Why is it that you are on the 10-milligram tablets now instead of the 5 that you used to be on?

A. I am not on 10 now.

Q. You testified yesterday that you were?

A. I said I had taken 10 at any time I felt like I needed it, but I am not any more ten than it is five.

Q. As I understood you, you used to take 5-milligram and now you are on 10-milligram tablets?

A. You misunderstood me.

Q. Now then, you say that Spivak here brought in a bunch of

truck drivers for you?

A. Yes, sir, that's what he said he did.

Q. And that's the first time you ever saw him in your life?

A. No, sir.

Q. When is the first time that you ever saw--

A. I can't remember that, but after I got acquainted with him, then I remembered him coming in before that time several times.

Q. What was he doing, there?

A. Well, I don't know, but every time that I was out or changed a man or something, he was walking up and down the hall and talking to the men just like anybody else, only he was, seemed like he was more restless and unquiet and distrubed.

Q. What was he doing there?

A. Well, my office, sir, is a public place and I had a large waiting room and everybody is welcome, sick or well.

Q. Didn't you ask this man what he was doing there in your office?

A. Yah, I asked him if there was anything I could do for him or help him out and he said he was just nervous and that he would see me when I got through examining the men.

Q. All right, did he?

A. Well--

Q. How many men did he bring in there?

A. That would be impossible because they come in usually from one to, I believe the most was, four at one day, at a time,

I mean come in scattered in like that.

Q. Well, now, I want you to tell us if, when he came in there with those truckers, if that was the first time you say that you ever saw him?

A. I would have to say that he was in there with the truckers and that he come very often and he never was recognized to me until in March.

Q. My question is, when is the first time you saw this man, Doctor?

A. To know him was in March.

Q That's the first time you ever saw him?

A. No, sir, to know him I said.

Q. Well, the first time you ever saw him was when?

A. I don't know.

Q. Was it prior to the time that be brought those truckers in there that you say he brought?

A. No, sir, he was always with the truckers.

Q. Sir?

A. He was always with the, with some of the transport men.

Q. I see, every time that you saw him?

A. Except the 21st of March.

Q. But prior to that time he was always with some truckers?

A. Yes.

Q. And did you and him ever have a private conversation?

A. Yes, sir.

Q. Well, what was said at those private conversations?

A. He was an ex-Service Medic--

Q. A what?

A. A Medic in the Military Service.

Q. Yes?

A. And he had had lots of experience with medicines and he hated that he wasn't in medicine now and he would like to learn some of my technique and know something about the medicine which I used in the office and which I give to patients and how I give it to them.

Q. So what did you say?

A. I said, "Fine, I'm always glad to impart any knowledge that I might have accumulated."

Q. Did he tell you he was living there in Dumas?

A. He was going to live there in Dumas but he had come up from Big Springs.

Q. Well, just exactly what did you and Spivak agree that he would do there in your office?

A. Well, there was nothing about it that I remember that he was to do except that he did have permission to ask me any question about any drug that he cared or choosed to do and to ask me the dosage on any of them.

Q. You said yesterday (we are talking about those drugs), "I have taken them since 1940 for myself. I have taken them 17 years and I'll take on the average of, oh, anywhere up to five hundred a month."

Do you take five hundred of these tablets a month?

A. Shouldn't you have, "could take them?" I can take that many a month.

Q. I'll take on the average of, oh, anywhere up to five hundred a month."

A. I believe you misunderstood that. Not five hundred a month.

Q. Yes, sir, that's what I understand.

A. Fifty-milligrams, I can take, a day, and whatever that would amount to, thirty times that would be the answer.

Q. When you get up of a morning, do you take one of these tablets the first thing?

A. Well, sir, I would say this: a lot of times I am up a long time before morning comes and I don't. When I am around the house and get up at normal times, most usually I try to take one tablet before breakfast, thirty minutes.

Q. And then when do you take the next one?

A. Usually around 9 o'clock, but it's no definite time.

Q. All right. Then when is the next one?

A. Ordinarily, if I am fortunate enough to have lunch, I'll take one then.

Q. And when is the next one?

A. Usually from 1 to 3 and from and between 4 and 5, if I am around the house.

Q. Well, your testimony yesterday was that, "Then I'll take one at 1 o'clock and ordinarily one at 2 o'clock and then if I am not pretty well saturated, I'll take another one between 4 and 5 o'clock."

What do you mean by "saturated," Doctor?

A. There is a feeling of certain nervousness that will come

on to a patient when you have an excessive amount of thyroid or some other stimulating medicine, like this medicine, that will make you so you just won't feel all slouched down in your seat and don't want to get up and get around. That's the way I would judge that.

Q. What do you mean by "saturated"? Is that what your definition of saturated is?

A. Well, I believe that's exaggerating. Saturating is where there will be no more substance taken up in that particular vehicle and I would say that there would be no way that anybody could tell when the blood stream was saturated, so I let it be according to the feelings in which I feel personally about moving about in the house.

Q. That's what you mean by "saturation?"

A. Yes, sir, I don't mean it scientifically or technically.

Q. Just according to how you feel?

A. Yes, sir, my own personal feelings, yes, sir.

Q. Now, how long is one of these tablets supposed to have its effect on you, on the body?

A. Six to eight hours is a five-milligram.

Q. Six to eight hours?

A. Yes, sir. Five is pretty good.

Q. Here you are taking one at 1 o'clock and one at 2 o'clock and one at 4 o'clock?

A. Remember, those pills are made and graduated for people weighing about 135 pounds, and I weighed 225 pounds.

Q. I understand, but the pills last, have an effect for six

hours?

A. On people weighing 135 pounds. That goes by pounds or kilogram.

Q. Is that the way you prescribed it, by pounds?

A. I usually find out how much a man weighs and suggest a dose according to that.

Q. According to his weight?

A. According to his weight, yes, sir.

Q. That's the way you prescribe it?

A. Not all the time, but I say that's a rule, that's a yard-stick, I use.

Q. And you prescribed for this man right here, according to your exhibits here, you prescribed for Spivak on March 2nd fifty Dexedrine sulfate tablets, didn't you?

A. I don't see the date, but the date on the bottom of the prescription, if that's what it is, that's right.

Q. And then on March 5th, three days later, you prescribed a hundred?

A. Tablets.

Q. One hundred and fifty in three days for this man?

A. Yah, that's right. This man is a scientific man; he has had experience in drugs. He knew how to take drugs and he was a Medic in the Service and he was an ex-Service Medic man and he had a lot of experience there and he was leaving town at that particular time, and that's the reason why you can give them to an expert on that medicine.

Q. And you dispensed to him 150 in three days, didn't you, by your own testimony, your own records?

A. Yah, that's right.

Q. Now, you told us yesterday that you ordered these pills in bottles of a thousand; is that right?

A. I believe I said I order them usually at five thousand they pay the postage, the parcel post and deliver at one time.

Q. How do they come, in bottles of five thousand?

A. Each company sends them in a different way.

Q. Do you ever get bottles of one thousand, Doctor?

A. Yes, sir, I do.

Q. Look at those bottles there in front of you and tell me if you ever had any of those in your possession?

A. Sir, all the bottles that I ever seen are built on the same color that they are and the label is the only difference and any label can be put on a bottle suggestive of the firm that they might have.

Q. Did you ever get any bottles like those, Doctor?

A. I'll get bottles with that color, yes, sir.

Q. Did you ever get any bottles like those?

A. How do you want me to answer that?

Q. Truthfully?

A. Truthfully, I get bottles of that color and that shape and that form.

Q. Now then, did you dispense to Mr. Spivak a thousand tablets at one time in March?

A. No, I didn't.

Q. Well, what did you dispense to him after you had given him those two, one hundred and fifty in three days?

A. I believe I'll ask you to repeat that question.

Q. You dispensed these two (indicating)?

A. Yah, that's right.

Q. One hundred and fifty in three days?

A. That's right.

Q. Now, when is the next time you prescribed for him?

A. The next time I prescribed for him was March 21st.

Q. And how much did you prescribed for him then?

A. I wrote him a prescription, and if I remember right, for fifty tablets.

Q. And where is that one?

A. I have checked the drug stores in town and I can't find it.

Q. Can't find that one. When is the next time you prescribed for him?

A. It was March 22nd.

Q. For this man here?

A. Yes, sir.

Q. What did you prescribed for him then?

A. I have no record of it, but I imagine it was fifty.

Q. And where is the prescription for that one?

A. I checked all the drug stores and he didn't get it filled.

Q. So those others you can't find?

A. No, sir.

Q. I see. Where do you claim that the Government got ahold

of these three bottles, Government's Exhibit 1, 2 and 3?

A. Sir, they can pick them up along the road if they want to; you can get them anywheres.

Q. I see. But it's your claim that you didn't give Keating one of them and Spivak two of them?

A. That's positively the truth.

Q. Well, where do you claim that they got them?

A. I never claimed, sir. That's not my affair.

Q. Now then, you don't make any money out of your practice you said yesterday, you don't send out bills and you are losing money on your farm. What is your source of income?

A. Well, Mr. Binion, I believe you have got that wrong.

Q. All right, you correct me.

A. I am bound to make enough money to live on because I am still weighing 190 pounds so--

Q. What is your source of income?

A. I do make money on my practice, sir.

Q. Do you ever sell these pills to anybody?

A. I never sell pills. I include them sometimes within the office call on people.

Q. But actually you just don't sell them?

A. Well, I am not a druggist, in the druggist business I understand drug store work.

Q. I understand that, too , but do you ever sell pills?

A. No. sir.

Q. You don't sell them to anybody?

A. No. sir.

Q. Under any circumstances or conditions?

A. No sir.

Q. All right, Now then, the effect of amphetamine is to pep you up, isn't it?

A. Well, there is one thing they didn't bring out yesterday; It does analyze and destroy the enzymes of the endocrine--

Q. What's that?

A. It destroys enzymes of the endocrine glands of the body.

Q. Now, then, amphetamine peps you up, doesn't it?

A. Well, I would say yes, it peps you up to a certain extent.

Q. Keeps you from sleeping?

A. Keeps you from sleeping.

Q. And now then, the number you take, do you ever have to take any barbiturates for sleeping?

A. Oh, not for sleeping no. I can answer that easily but I have taken barbiturates.

Q. For what?

A. I had pneumonia in March '48, and I had taken some barbiturates during this cold and bronchial irritation.

Q. You don't have to take barbiturates to get to sleep at night?

A. No, sir, I just barely can make it to bed before I go to sleep.

Q. Have you ever given barbiturates to any of your patients?

A. Why, sir, you couldn't practice medicine five minutes

hardly without something to ease people. That's what they come to you for, is pain. That's the only thing that sends a man to a doctor.

Q. Well, do you ever give barbiturates?

A. Yes.

Q. Do you ever give them to counteract the affects of amphetamines?

A. No, sir.

Q. You never have?

A. No, sir

Q. None of your patients have ever come to you and complained about the amphetamine that you had given them and then you give them barbiturates to rest them, to give them some rest, relax them and they can sleep?

A. Would you split that question half in two, sir, and I will answer it one at a time?

Q. Go ahead any way you want to.

A. You asked me if I had ever given barbiturates to people that I have given amphetamine sulfate, is that right?

Q. That is right.

A. I certainly have because all my patients comes in at different times and on different occasions that I do give the same people the different drugs. Some patients of twenty five years outstanding, twenty-five years, and I have taken care of them through all that, so I would have to give them--if that's what you mean.

Q. To counteract--

A. No sir, I didn't say that. I said I had given barbiturates to the same people. Now the next question you asked--

Q Are barbiturates habit-forming?

A. They are not habit-forming unless a patient wants them to be habit-forming, like if you will put it in the same class with alcohol and beer and coffee, then I would say yes. If you put it in there as a scientific and destructive to the body, I would say so.

Q. Well, you don't know of any harmful effects to your patients, any harmful effect that has come to them as a result of your prescribing and giving them amphetamines; is that right?

A. That's right, yes, sir.

Q. Is it possible that some harm could have come to some of your patients and you wouldn't know about it?

A. Can I explain that?

Q. Yes.

A. If you give a patient barbiturates or if you give them amphetamine (and I believe amphetamine is the one you are interested in) at a time that the patient--if you have trained them--they will never get enough of them to bother them because when they get enough to become saturated to a point, then they can't take them any more becuase they would be so nervous they couldn't hold a glass of water, but they are still not in a shape then where they are injured by the effect of the amphetamine to the tissues of the body, and it

is one, and the only drug, in the Pharmacopoeia that does not have an antidote for overdose or poisonous dose.

Q. What's the most you would prescribe at one time? Suppose one of your patients came in and said he was feeling low and wanted to get some pep, what's the most you would prescribe at one time?

A. Well, that's a little bit hard to answer for this reason: if I was going to stay in just one day, or if they want them for two or three days like maybe they might be on a trip or visiting or hunting, or something like that, the thing then would set up a new picture and I would probably prescribed more than I would if it was just one day. If it was just one day, they come into my office that way, I would just possibly give them a pill or two and that's all they would need for that day.

Q. What is the most then that you have ever prescribed at one time for any patient or a stranger?

A. I would say that I have in some cases where the patient lived a long ways from me, I prescribed--I got one in Boise City; I prescribed, I believe, as much as 500 tablets for a period of two or three months.

Q. Five hundred tablets?

A. Yes, sir.

Q. At one time that you have prescribed?

A. Yes, sir, It's not unusual.

Q. Well, what's the most you have ever given out or dispensed yourself at one time there in your office?

A. Well, it's not unusual for, that I have given as much as 500 tablets.

Q. I don't understand what you said?

A. I said it hasn't been unusual on certain patients that I have had for long standing to give as much as 500 tablets.

Q. At one time?

A. At one time.

Q. There in your office?

A. Yes, sir.

Q. Who are those people?

A. Well, I believe some of them live--one of them lives at Cactus. I would have to go check that. I can find some and have them here, though, if you want them.

Q. Sir?

A. I can find some patients and have them in here if you want to interrogate them.

Q. Doctor, what is the day that you say that Keating and Spivek came in there together?

A. That on March 23rd.

Q. Now, I want to hear again what you say happened there?

A. Well, Spivak, that gentlemen right there by you, he came in sometime between 11 and 12, I would judge, maybe; that's as close as I could get to it: I think it was maybe 11:30. And he just got back from a trip with his wife and his three children and he was so happy and so thankful that I had helped him to make it possible to make that trip, and he had already had these two prescriptions, twenty-one and twenty-two

and he said he tried over town and he couldn't get--

Q. What do you mean, "twenty-one and twenty-two?"

A. Well, I wrote him one on March 21st and then one on March 22nd.

Q. Those are the ones that you can't find?

A. That's right.

Q. Oh, I see.

A. And he would like to have another prescription, that he was going to Mexico, so I said, "Well, there is no use giving you the prescription because you can't get that filled."

Q. Said what?

A. I says, "There is no need to give you a prescription," because he had definitely told me he couldn't get them filled; he had tried every place in town and there was no place he could get them filled. So I said, "Well, since you are a Medic, I have dextro-amphetamine sulfate," which is a chemical name for that particular drug that is branded Dexedrine and Benzedrine, and I says, "They are a lot more expensive and I would give you some out of my bottle if you cared to."

He said no, he didn't believe he wanted any of them; they didn't do him any good; he had tried them. So he started to go and then he said, "Well, give me a dozen". I give him some, reached up in my cabinet there and give him some pills in a small box, and that box had on it, wrote on it, "Tablet 30 minutes before each meal and not later than 4 o'clock."

Q. How many tablets did you put in that box, Doctor?

A. Well, if you will discount errors, I would say a dozen; could have been one more.

Q. What were you prescribing that medicine for?

A. He was, had his truck broke down and his partner was out of town with this truck in a garage, he said, getting it fixed, and he was trying to make enough money to pay for this wreck.

Q. Doctor, I am asking you why you prescribed that forty tablets you just told us about that you put in a box for this man:

A. He was driving most of the day and night, he said, and he needed them to keep awake and keep his mentality at a higher level.

Q. And you think that that's all right, for truck drivers to have forty in their possession and take them just like they want them; is that right?

A. I would say if they are a medic and had experience that away, they would be eligible to have any quantity of the tablets that they wanted.

Q. And that's the reason you gave him a thousand?

A. Well, sir, Mr. Binion, if you want to ask me that ten more times, I'll say no. Is that all right?

Q. Whatever the truth is, Doctor.

A. That's the truth, so help me God.

Q. That's all we are after. All right, and then after you gave him that forty and he left, when did he come back again now on this date?

A. As he left out he said he was leaving to go to Mexico and he could get all the pills he wanted out there at a filling station, drug stores, cafes, and wanted to know if I wanted him to bring me some back, and I told him no. I had plenty to do me, and he came back about, I would say, 1 o'clock and he said "Well, my luck's changed." Says, "My partner's come in and brought the truck in," and said, "It wasn't damaged near as bad as we thought it was," and said "He's out here now and I would like for you to meet him. I would like to bring him in."

I says, "Well, I haven't had a key in my lock twenty some odd years, so it's always open to the public. Come on in It's all right with me."

And so he went off and--

Q. Well, now, how many times did he sit around and examine your pills? You told us that he was going to learn, take some advice from you since he was a Medic, and you never have told us when you all got around to discussing the different medicines and taking your advice and learning from you?

A. Well, as far as visiting, we never visited long in one place, but we would talk in the room and in the hall and when we would come together he would sit out there, stayed out there right smart, and we just casually talked as often as we needed to, and he asked me a lot of questions. Seemed like he was more interested in morphine than he was anything else.

Q. What did you discuss about morphine?

A. A dose and how much I had and where I kept it.

Q. And what did you tell him?

A. I told him where I kept it and what I had and how much I had.

Q. Is that all you ever talked about, morphine?

A. No sir, we discussed it a lot of times pro and con, addicts and therapeutic value.

Q. What about the addicts? That's what I'm after?

A. Well, anybody that takes morphine or some of the alkaloids--there is nineteen alkaloids, O.P.H. --you are subject to be more or less--

Q. Let's get back to the question. What is it that you and Spivak talked about as to addicts?

A. The fact that if you take any O.P.H. over a period of time, ten--I told him ten doses was normally given as a beginning or starter of an addict. After you take ten doses then you have, all your system, your tissues are broke down then where they are accepted (sic).

Q. Is that the extent of your conversation about addicts?

A. No, sir, We repeated it several times.

Q. Who would bring it up?

A. Well, Spivak brought it up, the subject up, mostly, whenever we would talk about them.

Q. Well, how would he bring it up? What is it he would say to you that you would all start talking about addicts?

A. Well, he impressed me that he, in the Service, that he had had lots of morphine; said had it come in a one-shot system, one-shot serum, and he had had an excessive amount at

his disposal during this particular time he was in the Service, and he said that he had never got a chance to follow up those cases where he had given morphine, to see what they were, and he wondered how many shots you could give a man before he would be in that category, and I believe he asked me what tissue that that would work on more than anything else, and I told him it was the C.N.S.; that's central nervous system.

Q. When was this conversation you are telling us about?

A. It ranged from March 1st until maybe the 10th or along in there somewheres, and that's when he was supposed to have left, when he got the last prescription there on the 5th I believe, and if I remember right, I didn't see much of him after that particular prescription, until the 21st.

Q. Well, when he came back the second time that day, was that when he had Mr. Keating with him?

A. Well, which day do you have reference to Mr. Binion?

Q. Twenty-first, I beleive you are talking about.

A. Twenty-first, he came by hisself, and Keating, if that's his partner, was a way on the truck repairing it.

Q. Well, did Keating ever come in that day?

A. No, sir.

Q. When was it that Keating came in?

A. Keating came in about 1:30 on March 23rd.

Q. This is two days later?

A. Yah, two days later.

Q. And is that when you said that Keating reached back like

this (indicating?)

A. That was after--he come in at 1:30 and he talked a few minutes and he thanked me for helping him out so they could pay for their truck, and then he said, "You give Spivak some tablets," and he said, "We both now got a truck a piece and we are going to Mexico and I would like for you to give me some tablets."

I said, "No, you have got enough tablets there for both of you in case you have to go to the Line; it's only forty six miles," I says, "To the Mexico line."

And he says, "Well, why don't you give me tablets?" I said, "Well, you have got enough, that's the reason. You don't need them. You are going right on over there and it would be in your way because you are going to get some more." And he kept arguing with me and arguing with me and he finally decided that I wasn't going to give him any more tablets.

Then he says, "You will give me tablets." He says, "You will give me some tablets." I says, "If I will, then don't bother me. Go ahead."

He said he could take them, and than I says, "Well, if you can do that, then you don't need me." And he says, "I will take them," and then he walked over to the door and put his hand on his hip pocket and had a bulge in there, could have been a pocketbook for all I know, with all the money he had, and he said, "I can kill you right here and the Government won't do a thing to me because I have got more money, more power than a U. S. Government Marshal." I said, "Okay".

He says, "I can go into your place right here and take every pill you have got in this house under lock or out."

"Okay."

He said, "I can stop any truck, a wholesale truck, I can go into any drug store, I can go anywhere."

"Well, why are you here bothering me for pills if you can do that?"

And so it kept getting louder and stronger and more determined and finally the telephone rang and I got up to go answer the telephone, and so he pulled the door to and put his foot behind the door, and by that time Mrs. Betty Simmons had answered the telphone, and she came back to tell me that they wanted me on the phone.

Well, she happened to get hold of the door and push it and I pulled it about the same time and the door then flew open, and then we was kind of separated at that place, and I went and answered the telephone.

Well, they were in there, and she didn't go in; she was in the hall when I left out and they were still in the room. And as I answered the telephone and started back in there, then he came out into the hall of my treatment room.

Then they said, "All right, smarty, don't get too smart, he said, "I've already called the sheriff and the sheriff is out of town and the deputy is not in the office," and he says, "No use calling the Marshal; he's out of town. And the deputies," said, "You can't get them."

I said,"Well, you took care of everything then, didn't

you?" Then I asked Spivak along about that time, I said, "Have you stayed in Dumas all this time?"

"Why, certainly not. You think I would stay at one of your ratty hotels here when I go to Amarillo in the biggest hotel and room. I'll have wine, women and song." And he says "The Government pays me everything and I don't have to do nothing." And another thing he says, "The more miles I put on that car, the more money I can get. And if I can just find a sucker like you every so often," he says, "I'll have this for a long time." He says, "This sure is an easy job, the best we ever had."

Q. Doctor, how many pills have you been on this morning?

A. I believe, Mr. Binion, if you remember I said ten.

Q. Ten today?

A. Yes, sir.

MR. BINION:

I think that's all.

MR. MCCARTHY:

That's all, Doctor.

We rest, your Honor.

THE COURT:

Any rebuttal?

MR. FLOORE:

Yes sir, May we have just a moment to line our witnesses up?

****

LAWRENCE SPEEGLE,

called by the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLOORE:

Q. Please state your name.

A. Lawrence Ray Speegle.

Q. Where do you live?

A. At Los Angeles, California

Q. Are you a veteran of the Korean War?

A. Yes, sir, I am.

Q. Were you a front-line medic during the Korean War?

A. Yes, sir, I was

Q. How long were you overseas?

A. Twelve months.

Q. Did you return to the United States in 1951?

A. Yes, sir.

Q. And were you placed in a hospital as a victim of combat fatigue?

A. Yes, sir.

Q. Thereafter did you attend school?

A. Yes, sir.

Q. For about how long?

A. Approximately six months.

Q. Then what happened to you after you left school?

A. I went to work at Dumas, Texas, as a radio announcer at KDDD.

Q. Mr. Speegle, I am going to ask you about some experiences you have had, but I do not want you to tell me one word that you have not either told the defendant in this case heretofore as his patient--

A. Yes, sir.

Q. --or that he does not, to your knowledge, know about of his own knowledge?

A. Yes, sir.

Q. Do you know the defendant in this case, Thomas Guy Brown?

A. Yes, sir.

Q. When did you first meet the defendant, Thomas Guy Brown?

A. At approximately May of 1953.

Q. Will you tell me the circumstances under which you met him, why you sought him out, if you did seek him out?

A. Going back to the hospitalization, I was taking treatment, was sub-insulin, and I was in a depressive stage.

Q. Perhaps you had better tell us when you left the hospital?

A. In 1953; approximately February of 1953. During my working period in Dumas as an announcer for KDDD, I began to get a little nervous and at times depressed at other times, and I went to the Doctor and told him--

Q. How did you happen to select this doctor?

A. Well, in the telephone directory, in the classified section, I think Dr. Brown's is the first one there.

Q. Did you call for an appointment?

A. Yes, sir, I did.

Q. Tell us what happened?

A. I made an appointment with the doctor. I drove-- at that time wasn't too well acquainted with Dumas-- and I searched for his office, finally locating it in the hotel in Dumas, and I went in to the doctor. The doctor did a urinalysis on me, and after the urinalysis, why, he asked me to come back the following day and made an appointment at that time.

The following day I went back. I was very anxious at that time about the effect of the sub-insulin had had on me and perhaps making me diabetic or something of that nature, so I went back to the doctor the following day and he prescribed treatment for me. The treatment was in the form of Dexedrine.

Q. He prescribed for you Dexedrine tablets?

A. Yes, sir.

Q. Did he give you a prescription?

A. I believe that is the way it was at that time, sir.

Q. Tell me what happened, but again please carefully refrain from telling me anything on this witness stand that you have not either told this doctor about as his patient, or that he doesn't know about from his own observation?

A. True, sir.

Q. All right, tell me what happened?

A. I took the Dexedrine for approximately, as the doctor prescribed, I would go back at periods to the doctor. He would take a blood pressure apparatus and take my blood pressure. This was approximately at intervals of three days; I won't be

specific. Then I took the Dexedrine for a month or month and a half as prescribed.

Q. Let me ask you this: prior to the time that the doctor prescribed this Dexedrine for you, had you ever, to your knowledge, had a Dexedrine tablet or an amphetamine?

A. No, sir, I hadn't.

Q. Any tablet of any sort like that?

A. No, sir.

Q. Thank you. Go ahead, You took it as prescribed for awhile?

A. Yes, sir, I went back to the doctor and he increased the dosage. At that time I did not know--I cannot recall exactly how I was prescribed to take the Dexedrine. And the doctor at that time increased the dosage and again gave me medication, and I think that this time was the period in which the doctor began to give me little boxes of Dexedrine.

I again started--I was taking the Dexedrine and I took it for approximately another two or three weeks. It was very difficult for me to announce because it dries your mouth out, dehydrates you, and also you can't sleep. So I went back to the doctor--

Q. What other symptons did you have that you told the doctor about?

A. In the effect that I couldn't sleep, I couldn't announce because it dried my mouth out; drank an awful lot of water, and it exhausted you to the point where, if you laid down, why, you would have just a very brief mental blackout; you would get very dizzy and some illusions you would have.

So the doctor prescribed for this sleeplessness a sodium seconal and I began to take seconal in the evening to sleep. See, it gets in a vicious cycle.

Q. Did he continue his prescription of the Benzedrine or the amphetamine tablets?

A. Yes, sir.

Q. So that under his supervision you were taking amphetamine tablets to stay awake and seconal to go to sleep; is that what you are telling us?

A. Yes.

Q. Did you continue to maintain the normal dosage of each or not?

A. No, sir. Gradually I built up a tolerance to the Dexedrine to the extent where I was taking four to six Dexedrines at a time.

Q. How many times per day?

A. About four or five times a day.

Q. That would be some twenty to thirty tablets a day?

A. That's right.

Q. And the doctor knew this; you had told him?

A. Yes, sir.

Q. Go ahead.

A. Not only did I tell the doctor; I was going back to get the prescription from the doctor and to get the medication from the doctor, so he knew--I mean, there would be no doubt in his mind that either I was just throwing away money or I was taking the medicine. After taking this for a period of about

five months, I would say, I came to the point where I was mentally exhausted, incompetent, unable to perform my duty, and I began to get hallucinations, illusions, and the outcome, I attempted suicide, attempted suicide by taking an overdose of sleeping pills or sodium seconal and slicing my wrists.

Q. Were you taken to a hospital?

A. Yes, sir, I was.

Q. Did Dr. Brown atten you at that hospital?

A. Yes, he did.

Q. Were you taken off the medication in the hospital?

A. Yes, I was, as far as I know. Let me clear this up, too: at this time I became, as I said, incompetent, reality did not mean very much to me, and I was to the point where I was such an incompetent that I could not--no reasoning about me whatsoever, I mean, very little of what was going on around me.

I was placed under restraining order in the VA Hospital in Topeka, Kansas and I was kept at the hospital for a period of about ninety days.

Q. Now, Dr. Brown wasn't at the hospital, was he?

A. No, sir, not at Topeka, Kansas.

Q. Don't tell us anything here that you haven't told Dr. Brown.

A. Yes, sir.

Q. Go ahead.

A. Returning from the hospital at Topeka, Kansas, I came to

the Panhandle of Texas. I went to Pampa, Texas, At Pampa I auditioned for a job at KPAT, and it was another unreality to me of being with people that was abnormal for the first time in my life, any long period of time, and then coming right back into a society that was normal, so I went from Pampa, a couple of days after I moved there back to Dr. Brown at Dumas, Texas, and I told him exactly what had happened in Topeka, that I had been under medication there. I don't recall the medication that they gave me in Topeka, as I was in a violent ward or drastic ward where they give you drastic treatment for about a month and a half and restraining cuffs and restraining sheets. But I went back to the doctor again I got back on the amphetamines or hypnotic drugs.

Q. Did he prescribe them for you?

A. He prescribed them for me again.

Q. Was there likewise a prescription for seconal or something similar?

A. Yes, sir, there was.

Q. He was giving them both to you at the same time?

A. Yes, sir, he was.

Q. What was the result?

A. The ultimate end to this was that I had taken these Dexedrines and seconal for just a short period this time; I went on a big bender with them, you might say, by taking just handfuls of them, and I ended up again incompetent to the point where I was committed by a court in Palo Pinto, Texas, to the Veterans Hospital in Ft. Lyon, Colorado.

Q. Thereafter, am I correct in my recollection that thereafter this man did not serve as your doctor. Heretofore there had been a doctor-patient relationship at all times?

A. Yes, sir, that's correct.

Q. So after you were committed to Ft. Lang, Colorado, he did not again serve as your doctor, did he?

A. That's right.

Q. I direct my questions now--let me show you the Government's Exhibit #1, the Government's Exhibit #2 and the Government's Exhibit # 3. Will you take them and examine them? Have you examined them?

A. Yes, sir.

Q. Now after the time you have told us about, I will ask you whether or not from time to time you returned to Dumas, Texas, and went to the office of the defendant, Dr. Guy Brown?

A. Yes, sir.

Q. Did you have any business transactions thereafter at his office?

A. Yes, sir, I did.

Q. With reference to thousand-tablet bottles of 5-milligram tablets, 5-milligram amphetamine tablets?

A. Yes, sir, I did.

Q. Were the bottles similar to Government's Exhibits 1 and 3?

A. They are exactly, sir.

Q. And were other business transactions similar to the

Government's Exhibit #2?

A. Yes, sir.

Q. Tell us about those business transactions?

A. At this time I moved into Colorado, was working at KIMR, Lamar, Colorado--

Q. I am sorry, all I want to do is for you to tell me how far you drove and what your business transaction with the doctor was?

A. I drove some 400 miles; I would purchase a bottle similar to this one right here (indicating).

Q. What would you pay for that to the doctor?

A. I don't recall, sir, not exactly, the exact amount of payment, because at that time I was very--I was high on his pills and I would walk in and just pull money out and hand it to the doctor, but the exact payment I do not know. I think it was approximately fifteen or twenty dollars for a bottle such as this nature here.

Q. And you point to Government's Exhibit 2. Look at the number here.

A. This one here (indicating).

Q. No, Government Exhibit 2 was the one you first had.

A. This is number 1 and this number 2, right?

Q. Number 2 is the one you tapped when you said "fifteen or twenty dollars."

A. Yes, this is the thousand, 10-milligram amphetamines, yes, sir.

Q. That's what you paid fifteen to twenty dollars for?

A. Yes, sir, that's correct.

Q. Did you purchase from time to time thousand-tablet bottles similar to the 5-milligram tablets there, Government's 1 and 3?

A. Yes, sir, I have.

Q. And what would you pay to the doctor for those thousand-tablet bottles of 5-milligram tablets?

A. Approximately the same thing, sir.

Q. I will ask you whether or not you purchased from the doctor dextro-amphetamine sulfate or dextro-amphetamine hydrochloride tablets in every larger quanities than the thousand-tablet bottles there?

A. Yes, sir, I have.

Q. What would the container for such quantities be?

A. We poured them at one time into a larger plastic bag and I carried the plastic bag out.

Q. Did you have any other place that you could purchase these tablets?

A. No, sir.

Q. You would drive as far as 400 miles to have a business transaction with the doctor?

A. That's correct.

Q. Over how long a period of time did you continue to have these business transactions with the doctor, buying from the doctor these dextro-amphetamine sulfate and dextro-amphetamine hydrochloride tablets?

A. I will approximate this.

Q. Yes?

A. I will say a year and a half, sir.

Q. When did that time end?

A. In April or March of last year, approximately.

Q. Since you ceased having business transactions with the doctor with reference to these amphetamine tablets, have you taken any more of them?

A. No, sir, I haven't.

Q. That's been since March of last year?

A. Yes, sir, that's right.

Q. Have you taken any drugs of any sort since March of last year?

A. No, sir, I haven't.

Q. Until you were subpoenaed as a Government witness in this case, did you have a steady job in California?

A. Yes, sir, I did.

Q. Had you made steady progress toward promotion in that job?

A. Yes, sir, I had.

MR. FLOORE:

I pass the witness.

****

COURT'T CHARGE

MEMBERS OF THE JURY:

The Federal Law of the country makes it a misdemeanor

crime to dispense without a prescription any drug which, because of its potentiality for harmful effect or the collateral measures necessary ot its use is not safe for use except under the supervision of a practitioner licensed by law to administer such drug, and the Indictment here in three counts charges the defendant with violations of that part of the law.

A further provision of the law in dealing with the required prescriptions lists the lawful procedure in three ways: (1) Upon a written prescription of a practitioner licensed by law to administer such drug; (2) Upon oral prescription of such practitioner which is reduced promptly to writing and, (3) By authorized refilling of such a prescription which is promptly reduced to writing and filled by the pharmacist.

If you find that the defendant did dispense the original contents of Government Exhibits 1, 2 and 3, two of them to the Government witness Spivak, and the other to the Government witness Keating, then in determining whether he dispensed the drugs therein on prescription, you may properly consider whether a doctor-patient relationship existed between the defendant and the person to whom you may find he sold the bottle of drug in each instance,whether he considered the individual needs of the person to whom he dispensed the drug, the quantity of the drug dispensed and the manner in which he supervised the use of the drug. The fact that the defendant is a physician licensed under the Laws of Texas does not exempt him from responsibility for any violation of the terms of the Federal Law in question.

Now also, in respect to the offense charged in each one of the three counts of the Indictment, not only must it be shown that the drug in question was of the dangerous kind described in the law as I have quoted it to you here and that it was dispensed by the defendant without complying with the prescription requirements of the law, but also it must have been a drug which had been transported in Inter-state Commerce from some other state of the Union into Texas, and Dumas, Texas. In that connection I instruct you that if these drugs were manufactured outside the State of Texas, and more specifically, in the State of Pennsylvania, which is the only state that has been referred to in the testimony of the Government witnesses from the drug manufacturing concerns in Pennsylvania, then these drugs in Dumas had necessarily been transported in Inter-state Commerce between the time same were manufactured and the time you may think they were handled by the defendant.

Also I instruct you that it makes no difference when, how, or from whom the defendant acquired the drugs, if he did, or whether he knew that same had been shipped in Inter-state Commerce before they came into his possession, if such drug did come into his possession.

The mere Indictment herein is no proof of guilt against the defendant on any one of the counts in the Indictment.

The burden of proof in this case is on the Government, as the defendant has gone to trial presumed to be innocent, and you cannot convict on any one or more of the counts in the

Indictment unless you find and believe from the evidence and beyond any reasonable doubt that the defendant is guilty as charged.

"Reasonable doubt" is that hesitation of mind which exists where, after considering all of the evidence, one with reason fails to have an abiding and confident belief in the truth of an accusation.

You are also instructed that the Government is not required as part of its burden to prove that the defendant committed any violation of the law with conscious knowledge or intent to commit an offense against the law.

The statutes in question are of a regulatory nature, made to protect the public from dangerous drugs and persons dealing with such drugs must take the risk of whether their conduct in any given instance does in fact violate the law.

Now coming to count one of the Indictment, if you find and believe from the evidence and beyond any reasonable doubt that prior to March 10, 1956, a number of dextro-amphetamine hydrochloride tablets were shipped in Inter-state Commerce into the State of Texas in a bottle labeled in part, "Caution, Federal Law prohibits dispensing without prescription," and that thereafter on or about March 10th, 1956, and while a number of tablets of said drug in said bottles were being held for sale after shipment in Interstate Commerce, as aforesaid, the defendant Brown in Dumas, Texas did cause said tablets of said drug to be dispensed to one Spivak without a prescription therefor from a practitioner licensed by law

to administer said drug; and if you also further find and believe from the evidence and beyond any reasonable doubt that the drug so dispensed was of such a nature that because of its potentiality for harmful effect or the collateral measures necessary to its use was not safe for use except under the supervisions of a practitioner licensed by law to administer such drug, then and in such event you will find a verdict of guilty against this defendant in relation to the Government Exhibit #1.

Those exhibits tally with these counts?

MR. FLOORE:

Yes, sir.

THE COURT:

In relation to Government Exhibit # 1 and under the first count of the Indictment.

Now coming to the second count of the Indictment, if you find and believe from the evidence and beyond any reasonable doubt that prior to March 22nd, 1956, a number of dextro-amphetamine sulfate tablets were shipped in Inter-state Commerce into the State of Texas in a bottle labeled in part, "Caution, Federal Law prohibits dispensing without a prescription," and that thereafter on or about March 22nd, 1956, and while a number of tablets of said drug in said bottle were being held for sale after shipment in Inter-state Commerce, as aforesaid, the defendant Brown did in Dumas, Texas, cause said tablets of said drug in such bottle to be dispensed to one Spivak without the prescription therefor from a practitioner

licensed by law to administer said drug; and you further find and believe from the evidence and beyond any reasonable doubt that the said drug in question because of its potentiality for harmful effect or the collateral measures necessary for its use was not safe for use except under the supervision of a practitioner licensed by law to administer such drug, then and in such event you will render a verdict of guilty against the defendant under the second count of the Indictment.

Now coming to the third count, if you find and believe from the evidence and beyond any reasonable doubt that prior to March 23rd, 1956, a number of dextro-amphetamine hydrochloride tablets were shipped in Inter-state Commerce and into the State of Texas in a bottle labeled in part, "Caution: Federal Law prohibits dispensing without prescription," and that thereafter on or about March 23rd, 1956, and while a number of tablets of said drug in said bottle were being held for sale after shipment in Inter-state Commerce, as aforesaid, the defendant Brown in Dumas, Texas, did cause said tablets of said drug in said bottle to be dispensed to one Keating without a prescription therefor from a practitioner licensed by law to administer such drug; and if you further find from the evidence and beyond any reasonable doubt that such drug because of its potentiality for harmful effect or the collateral measures necessary to its use was not safe for use except under the supervision of a practitioner licensed by law to administer such drug, then and in such event you will find a verdict of guilty against the defendant under count

three.

But if you fail to find the defendant guilty under any one or more of the counts in the Indictment, then, of course, as to that count or counts, your verdict will be a verdict of not guilty. In this connection I will also say, for further clarity, that whether or not the defendant had the drugs contained in these three Government Exhibits, 1, 2 and 3, at the times in question and whether or not he was holding them for sale and whether or not they were a drug of the dangerous nature already described to you under each of these three counts, and whether he violated the prescription requirements of the law are all questions of fact which are committed exclusively to the jurors for determination in the exercise of your province under the law as the triers of the facts in this prosecution.

It might be well for me to say here, to avoid any confusion in the minds of the juro s, that whenever a drug of the specified sort is dispensed in violation of the prescription requirements of the statute, the law speaks of it as being misbranded, but do not let that trouble you from the standpoint of the peculiar nature of the meaning of the term "misbranded" in this law as compared with what people would ordinarily think of as being misbranded. It's just a word with a technical meaning in this law and that is the meaning that you should keep in mind in understanding it. The law simply makes a special and technical definition there of one thing that will constitute a misbranded drug.

One other point I should touch on perhaps is that the agents of the Food And Drug Administration did not do anything improper in law in concealing their identify for a time, if you think that is the way the matter progressed as between the Government witnesses and the defendant; and, on the contrary, public employees of this kind may rightfully use deception or decoys where they suspect there has been a violation of the law in attempting to find and single out persons who may be violating the law.

You are the judges of the facts proved, the credibility of the witnesses as you measure same under the evidence, their demeanor and any interest in the case, whether it be the defendant's obvious interest at stake as a witness or the interest of any other witness, and the weight of all the testimony and evidence is peculiarly within your province; but you are bound to be governed by the law as stated and explained in this charge.

When you have retired to the jury room, elect one of your number foreman; and when you have come to a verdict, it will be received here in open Court.

(Forms of verdict were read).

The first two forms are clear on their face and I am sure the third would be, too, but the third one you would have no use for unless your verdict should be one of guilty on one or more counts and not guilty on one or more counts of the Indictment; and in that event, the different blanks in the form would be filled in by the word "guilty" or the word "not guilty"

as the case may be.

(Jury retires.)

THE COURT:

Do Government counsel have any objections?

MR. FLOORE:

No objections by the Government.

THE COURT:

Do defendant's counsel have any objections?

MR. MONNING:

May it please the Court, the defendant does object to the Charge of the Court for the following reasons:

Generally, the defendant objects to the entire Charge of the Court because the Court has placed upon this defendant, a registered practitioner licensed by the laws of Texas, the obligation of securing a prescription for any sort of drug before the actual administration or use by that physician upon his patient, that of course not being within the meaning of the Act.

The defendant further objects generally to the Court's Charge because the Charge permits the jury to return a verdict of guilty, even though, as a matter of law, under the provisions of Section 353 (B) (1) of Title Twenty-One, this defendant could issue a prescription to a patient for 1,000 or 2,000 or 3,000 tablets, deliver the prescription blank to the patient, the patient could take the prescription blank to a pharmacist of any sort, secure from that pharmacist the 1,000 tablets or the 2,000 or the 3,000 tablets prescribed

without any violation of the law being had.

Third, this defendant objects to the Court's Charge generally because the Court has read into the provisions of Section 353 (B) a provision akin to that provision contained in the Harrison Act or the Narcotic Act, extending the coverage of the Pure Food And Drug Act to a physician engaged in practice and actually prescribing. The defendant insists that to read such a provision into the provisions of the Pure Food And Drug Act is not permitted by the terms of the statute, is expressly and by implication prohibited by the history of the 1953 Amendment which added Section 353 (B) to Title Twenty-One, which is the Pure Food And Drug Act. I specifically call the Court's attention to the Committee Report on that bill, appearing in the 1953 Congressional Record, in the 1953 volume of the Congressional Reports. I can furnish the Court with the proper name of that. It is in the Court's library. It is at page 2198.

It is the contention of this defendant that at the time of the adoption of the 1953 Act, it was never within the contemplation of the sub-committees or committee or the Congress of the United States to do any more than regulate the dispensing by pharmacists and other persons entitled to dispense when they were presented with a physician's certificate of drug--it was never the intention of Congree or of those Committees to attempt to regulate physicians.

In connection with this objection I also direct the Court's attention to the fact that any other construction that

that the District Attorney and the Court have placed upon this Act, constitutes a regulation by the Federal Government of physicians in their practice of medicine in the several states; and specifically, I call the attention of the Court to the Statement by Justice McReynolds in Linder versus United States, 69 Lawyers Edition, 819, in which he, writing for the Court, stated that that was simply not within the power of the Federal Government.

THE COURT:

In what case?

MR. MONNING:

Linder versus the United States. It was cited in the motion that we filed with you on the loose sheet of paper.

The defendant objects to the instructions of the Court on counts one and count two and count three because a literal interpretation of those instructions by the Court authorises the jury to return a verdict of guilty on each of the three counts if they find that the defendant dispensed these drugs without securing a prescription from another physician; alternatively, that the instructions on the three counts permit the jury to return a verdict of guilty in the event that they find that this defendant dispensed the drugs in question but did not write or reduce to writing a prescription.

The defendant objects to the Court's Charge, to the first part of the Court's Charge, in which the Court referred to the law with respect to dispensing because the Court's Charge erroneously instructed the jury that a practicing

physician could not dispense to a patient or anyone else under his care a harmful drug covered by the provisions of Section 353 (B) (1) without running a prescription or calling in a prescription covering that dispensing, it being the contention of the defendant that any physician can under any circumstances, dispense or administer to a patient or anyone seeking his medical help or treatment any drug other than a narcotic without making any record whatsoever of it.

To the same Section of the Court's Charge this defendant objects for the reason that the effect of the instructions by the Court is to require any physician desiring to secure drugs which necessarily must be labeled, "Caution, Federal Law Prohibits dispensing without prescription," to procure for that patient a drug by the issuance to that patient of a prescription and the directions to that patient, to deliver the prescription to a pharmacist for filling there.

The defendant objects to the second part of the Court's Charge in which the Court enumerated to the jury the three ways that a prescription could be filled because, while the Court, apparently read or paraphrased the provisions of the statute, the Court did not take into consideration and did not instruct the jury that it could take into consideration the fact that a practicing physician, administering a drug to his or her patients, could dispense the drug to that patient without violating the law.

The defendant objects to the general part of the Charge following that in which the Court instructed the jury that

they could take certain things into consideration in determining whether or not this drug had been prescribed by the defendant. I refer to the part of the Court's Charge that read as follows: Did dispense to the witness Spivak and the witness Keating, then in determining whether or not that was on a prescription, and so forth, for the reason that the Court has read into the provisions of the Act, words to the effect that a drug may be administered by a physician only in a bona-fide physician-patient relationship or as in Section 2553 of Title Twenty-Six of the United States Statutes, for legitimate uses, while in fact neither of those words were at any time used by the drafters of the statute and certainly are not included in the provisions of the Pure Food And Drug Act.

The defendant further objects to the same part of the Court's Charge for the reason that it places upon this defendant the duty of establishing in the evidence that a doctor-patient relationship existed, that this defendant considered the needs of the patient or person procuring the drugs, that this defendant supervised the use by the person procuring the drugs or drug, when in fact, under the Pure Food And Drug Act, there is no such requirement requiring such by the defendant or placing any such duty on the defendant, and the defendant earnestly says to the Court that the burden thus placed upon this defendant is even greater than the burden which would be placed upon a defendant in a like position being prosecuted under the Harrison Narcotic Act.

The foregoing exceptions were presented to the Court

immediately following the Charge to the jury.

THE COURT:

Overruled.

MR. MOWNING:

May the record reflect our exceptions?

THE COURT:

The rule takes care of that, but if you feel better with an exception, it's all right.

(Jury returns a verdict of guilty on all three counts.)

CLERK'S CERTIFICATE

I, JOHN A. LOWTHER, Clerk of the United States District Court for the Northern District of Texas, do hereby certify that the foregoing is a true and complete transcript of the record of proceedings had in said Court in Cause No. 2620 Criminal, wherein UNITED STATES OF AMERICA is Plaintiff and THOMAS GUY BROWN is Defendant, as such proceedings are listed in the Designation of the Record on Appeal as fully as the same remain on file and of record in my office in Amarillo, Texas.

IN TESTIMONY WHEREOF, I have caused the Seal of said Court to be hereunto affixed at Amarillo, Texas, in the Northern District of Texas, this the 4th day of May, A. D. 1957.

JOHN A. LOWTHER, Clerk
United States District Court
Northern District of Texas

By s/ Edna Wagner
Deputy

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16,536

THOMAS GUY BROWN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

MOTION FOR REHEARING

U. S. COURT OF APPEALS
FILED
JAN 23 1958
EDWARD W. WADSWORTH
CLERK

MONNING & MONNING,
1016 Fisk Building,
Amarillo, Texas,
Attorneys for Appellant.

SHEPPERD PRINTING COMPANY, AMARILLO, TEXAS

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16,536

THOMAS GUY BROWN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

Appellant presents this petition for rehearing in this cause and respectfully shows:

1.

This Court erred in holding that Sec. 353(b) (1) providing:

> "A drug intended for use by man which—
> (b) is not safe for use except under the su-

> pervision of a practitioner licensed by law to administer such drugs;
>
> shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription by such practitioner which is reduced promptly to writing and filled by the pharmacist, or (iii) by refilling any such written or oral prescription . . . filed by the pharmacist . . . "

makes unlawful a physician's act in delivering, administering or dispensing a quantity of harmful drugs.

2.

The Court erred in finding the statute broad enough to include a physician's administering or dispensing harmful drugs because Sections (b) and (c) recognize the right in this language:

> ". . . is not safe for use except under the supervision of a practitioner licensed by law to administer such drugs;"

3.

The Court erred in finding Subsections (i) (ii) and (iii) of the section apply to a physician's act in dispensing or administering drugs when the context of those subsections leaves no uncertainty but that they regulate pharmacists.

4.

In construing the 1951 Amendment to the Pure Food and Drug Act, the Court erred when it refused to consider the Congressional intention, as expressed

in the committee reports, to regulate pharmacists.

5.

The Court erred in judicially enlarging the Pure Food and Drug Act by reading into its provisions: "In the course of his professional practice only."

6.

The Court erred in attributing to the word "prescription" a meaning foreign to its ordinary meaning.

For the reasons stated, appellant requests that a rehearing be granted, and that on such rehearing the judgment of the Court be reversed.

Dated January 22, 1958.

Respectfully submitted,

MONNING & MONNING,
1016 Fisk Building,
Amarillo, Texas,
Attorneys for Appellant.

Ben P. Monning Jr

Of Counsel

Thomas Guy Brown, appellant herein by his attorney hereto, certifies that the foregoing petition is not presented for the purpose of delay or vexation, but is in the opinion of counsel well founded in law and proper to be filed herein.

Dated January 22, 1958.

Ben P. Monning Jr

BEN MONNING, JR.,
Attorney for Appellant.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16,536

THOMAS GUY BROWN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

MOTION FOR REHEARING

U. S. COURT OF APPEALS
FILED
JAN 23 1958
EDWARD W. WADSWORTH
CLERK

MONNING & MONNING,
1016 Fisk Building,
Amarillo, Texas,
Attorneys for Appellant.

SHEPHERD PRINTING COMPANY, AMARILLO, TEXAS

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16,536

THOMAS GUY BROWN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

Appellant presents this petition for rehearing in this cause and respectfully shows:

1.

This Court erred in holding that Sec. 353(b) (1) providing:

> "A drug intended for use by man which—
> (b) is not safe for use except under the su-

> pervision of a practitioner licensed by law to administer such drugs;
> shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription by such practitioner which is reduced promptly to writing and filled by the pharmacist, or (iii) by refilling any such written or oral prescription . . . filed by the pharmacist . . . "

makes unlawful a physician's act in delivering, administering or dispensing a quantity of harmful drugs.

2.

The Court erred in finding the statute broad enough to include a physician's administering or dispensing harmful drugs because Sections (b) and (c) recognize the right in this language:

> ". . . is not safe for use except under the supervision of a practitioner licensed by law to administer such drugs;"

3.

The Court erred in finding Subsections (i) (ii) and (iii) of the section apply to a physician's act in dispensing or administering drugs when the context of those subsections leaves no uncertainty but that they regulate pharmacists.

4.

In construing the 1951 Amendment to the Pure Food and Drug Act, the Court erred when it refused to consider the Congressional intention, as expressed

in the committee reports, to regulate pharmacists.

5.

The Court erred in judicially enlarging the Pure Food and Drug Act by reading into its provisions: "In the course of his professional practice only."

6.

The Court erred in attributing to the word "prescription" a meaning foreign to its ordinary meaning.

For the reasons stated, appellant requests that a rehearing be granted, and that on such rehearing the judgment of the Court be reversed.

Dated January 22, 1958.

Respectfully submitted,

MONNING & MONNING,
1016 Fisk Building,
Amarillo, Texas,
Attorneys for Appellant.

Ben P. Monning Jr
Of Counsel

Thomas Guy Brown, appellant herein by his attorney hereto, certifies that the foregoing petition is not presented for the purpose of delay or vexation, but is in the opinion of counsel well founded in law and proper to be filed herein.

Dated January 22, 1958.

Ben P Monning Jr
BEN MONNING, JR.,
Attorney for Appellant.

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
MAR 10 1958
JOHN T. FEY, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 846

THOMAS GUY BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE S. McCARTHY,
Fisk Building,
Amarillo, Texas,
Attorney for Petitioner.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	14
Appendix	15

CITATIONS

Cases	Page
Archambaut v. U.S., 224 Fed 2d 925	10
Jin Fuey Moy v. U.S., 254 U.S. 189	9
Linder v. U.S., 69 L. Ed. 819	12
Pierre v. U.S., 314 U.S. 306, 86 L. Ed. 226	12
Schlessing v. U.S., 239 Fed 2d 885	12
U.S. v. 10 Cartons, 152 Fed Supl 360	11
U.S. v. 2600 State Stores, 235 Fed 2d 913	11, 13
U.S. v. Cardiff, 340 U.S. 174, 94 L. Ed. 200	13
Webb v. U.S., 249 U.S. 96	9

Statutes	
21 U.S.C.A. 331(k)	3
21 U.S.C.A. 333(a)	3
21 U.S.C.A. 353	6
21 U.S.C.A. 353(b)(1)	2, 10
Harrison Anti-Narcotic Act	9

In the

Supreme Court of the United States

OCTOBER TERM, 1957

No.....

THOMAS GUY BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 3, 1958.

OPINIONS BELOW

The trial court did not write an opinion. The opinion of the Court of Appeals for the Fifth Circuit has not been reported in the Federal Reporter.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on January 3, 1958. (R. 190). Motion for rehearing was denied on February 8, 1958. (R. 195). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The petitioner is a practicing physician. He was indicted, tried and convicted of dispensing toxic drugs in violation of the Pure Food and Drug Act. The question presented by this case is whether or not the Act, 21 U.S.C.A. 353(b)(1), makes it unlawful for a licensed physician to dispense prescription drugs directly to a person without giving that person a prescription.

STATUTES INVOLVED

21 U.S.C.A. 353(b)(1) provides:

"(b)(1) A drug intended for use by man which—

(A) Is a habit forming drug to which Section 352(d) of this title applies; or

(B) Because of its toxity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drugs; or

(C) Is limited by the effective application under Section 355 of this title to use under the professional supervision of a

practitioner licensed by law to administer such drug,

shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription by such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription, if such refilling is authorized by the prescriber, either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale."

It was charged that dispensing without a prescription violated 21 U.S.C.A. 331(k), which provides:

"The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce, and results in such article being adulterated or misbranded."

A penalty for violating the Act is provided for in 21 U.S.C.A. 333(a).

STATEMENT

T. G. Brown commenced the practice of medicine in Dumas, Texas, in 1929 and has been practicing there ever since. He maintains his office in the examining room of his hospital. He is about 65 years old. Be-

ginning in 1940, Dr. Brown commenced taking amphetamine tablets for weight control and as a stimulant to his nervous system. He still takes them. They should be taken under a physician's supervision. "Amphetamine" is the active ingredient in drugs sold under the patented names "dexedrine," "benzedrine," "dexamyl," "desoxyn," etc., which are prescribed by physicians for reducing, alcoholism, narcolepsy, mental depression and vegetativeness in older persons. Laymen know them as pills which appease the appetite and keep a person awake.

In the spring of 1956 an F.D.A. inspector, posing as a truck driver, called on Dr. Brown at his office for the purpose of obtaining a prescription for amphetamine tablets. He testified the doctor gave him a prescription upon request, later gave him another prescription, and later sold tablets to him twice in bottles containing 1,000 each. On the last trip he was accompanied by another inspector also posing as a truck driver, who testified the doctor sold him a bottle containing 1,000 tablets. Both witnesses testified the doctor did not give them a physical examination or written or oral prescription before delivering the bottles. Dr. Brown admitted giving the prescriptions, but denied sale of the three bottles. Dr. Brown was indicted for selling the three bottles to the agents. (R.10).

Asserting that the Pure Food and Drug Act provides no limitation on a licensed physician's prescribing, dispensing or administering a drug such as am-

phetamine, petitioner moved unsuccessfully to dismiss the indictment (R. 13), for judgment of acquittal which was re-urged (R. 16), objected to the Court's charge (R. 175), and was convicted (R. 23). Pursuant to Rule 39(b)(1) of the Rules of Criminal Procedure, an agreed statement was filed (R. 2). On appeal, the Court of Appeals affirmed. (R. 183).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the Court below has decided an important question of Federal law which has not been, but should be, settled by the Supreme Court. The decision below should be reviewed because the Court has rendered a decision in conflict with the decision of another Court of Appeals on the same matter. Finally, the decision should be reviewed because the Court of Appeals has decided a Federal question in a way in conflict with decisions of the Supreme Court.

1. The decision below should be reviewed because the question presented is one of great importance and has not been settled by this Court. The Food and Drug Administration insists that the Act of October 26, 1951, amending the Pure Food and Drug Act must be interpreted in its broadest sense, and, doing so, that each time a physician administers or otherwise dispenses a drug he commits a misdemeanor if he does not write a written prescription to the patient. The Government stated in its brief in the Court of Appeals:

> " . . . We take the position, however, that even when the amount of drug dispensed by a physician is small, and it is dispensed in the course of a **bona fide** medical practice, this amounts to a minor violation of the Act unless a written record is made of the transaction . . ." (Page 15)

The Government and the F.D.A. must, to support their interpretation, disregard the history of the Pure Food and Drug Act, the reason for its amendment and must attribute to the word "prescription" a meaning it neither has in ordinary usage nor was intended by Congress. Prior to its amendment in 1951 the act regulated pharmacists only. Section 353(b) provided in part:

> "A drug dispensed on a written prescription signed by a physician, dentist or veterinarian . . . shall if—
>
> (1) Such physician, dentist or veterinarian is licensed by law to administer such drug and
>
> (2) Such drug bears a label containing the name and place of business of the dispenser, the serial number and date of such prescription, and the name of such physician, dentist or veterinarian,
>
> be exempt from the requirements . . ."

The Section dealt only with those drugs "dispensed on a written prescription signed by a physician . . . licensed to practice" and did not regulate physicians or drugs administered by them. In its original form the Act was not satisfactory to the F.D.A. or others affected by it, and amendments were proposed. The House Committee on Interstate and Foreign Com-

merce submitted its report No. 700 on July 16, 1951, and it reveals only a desire to clearly distinguish "prescription drugs" and to relieve druggists from unnecessary restrictions. Even the Attorney General so construed the Act, for the Committee considered the letter of Peyton Ford, Deputy Attorney General, dated April 30, 1951, in which he stated:

> "This would insert into the Federal Food, Drug and Cosmetic Act the theory, based on regulations, pursuant to which the Food and Drug Administration has recommended prosecution of druggists who sell, without prescriptions, drugs bearing the so-called prescription legend and which have not been removed from the immediate containers in which they were shipped in interstate commerce. Such a sale by a druggist would be in violation of Section 3331(k)."

The proposed amendment was also considered by the Senate Committee on Labor and Public Welfare, which submitted its report No. 946 on October 12, 1951, and that report reveals a desire to regulate druggists only, and no mention is made of attempting to regulate licensed physicians. The legislative history appearing in U. S. Congressional and Administrative Service, 82nd Congress, First Session, begins at page 2454. Nowhere is there an indication of the desire to regulate physicians; instead:

> "All drugs covered by the three classifications of prescription drugs must bear a label containing the statement 'Federal Law Prohibits Dispensing Without Prescription.'
>
> This gives the retail druggist clear notice that he will be in violation of the Federal Food, Drug

and Cosmetic Act if he dispenses any drugs so labeled without a prescription."

"This bill also specifies what information must be contained upon the label of the package dispensed to the patient. That label must contain the name and address of the dispenser, the serial number and date of the prescription or of its filing, the name of the prescriber, and, if stated in the prescription, the name of the patient and the directions for use and cautionary statements, if any, contained in the prescription."

"Also, as pointed out elsewhere, with respect to other habit forming drugs, oral prescriptions and refills are limited to situations in which the pharmacist obtains satisfactory evidence, on the basis of consultation with a licensed practitioner or otherwise, that the prescription or refill has been expressly authorized by such practitioner. A violation of the prescription requirements of paragraph (1) of the new subsection (b) is, under the provisions of this paragraph, deemed to be an act which results in the drugs being misbranded while held for sale."

The legislative history indicates that the Committee and Congress had in mind only the regulation of retail pharmacists and were concerned with relieving the confusion as to what drugs those pharmacists could dispense without a prescription and what drugs they could dispense only upon receiving a physician's prescription.

In Webster's First International Dictionary, the term "prescription" is defined:

"2. **Med.**, a written direction for the preparation

> and use of a medicine; a medical recipe; also, a prescribed remedy."

In Webster's Second International Dictionary, it is defined as:

> "A doctor's written direction for the preparation and use of a medicine."

The Government and Court below do not attribute the recognized meaning to that word. Instead, they read into the statute a provision like that expressly included by Congress in the Harrison Anti-Narcotic Act. The Harrison Act excepts:

> "(b)(1) * * * registered practitioners who give prescriptions for legitimate uses * * *."
>
> "(b)(2) * * * in the course of his professional practice and where such drugs are dispensed or administered to the patient for legitimate medical purposes." 26 U.S.C.A. 2553.

The importance of this provision is self-evident, but the Court below disregarded it. The importance of the statutory requirement that the prescription be

"in the course of his professional practice only"

has been noted by this Court on two occasions. In **Webb v. United States,** 249 U.S. 96 and **Jin Fuey Moy v. United States,** 254 U.S. 189, violations of the Harrison Anti-Narcotic Act were involved. In the Webb case, morphine was administered for the sole purpose of keeping the addict comfortable by maintaining his customary use. This Court held that the physician's order directing the dispensing of morphine to the

addict was not a prescription in the course of his professional practice only. In the Jin Fuey Moy case, the prescription was given to a person not the physician's patient, and this Court stated:

> "Manifestly, the phrases 'to a patient' and 'in the course of his professional practice only' are intended to confine the immunity of a registered physician in dispensing the narcotic drugs mentioned in the Act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer, or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug." (Page 194)

If the provision of Section 353(b)(1) is to be applied to regulate physicians in the conduct of their treatment when Congress did not intend that result, and if a vital provision "in the course of his professional practice only" is to be read into the Section, certainly it should be done by this Court.

2. The petition should be granted because the Court of Appeals has rendered a decision in conflict with another Court of Appeals on the same matter. In **Archambaut v. United States,** 224 Fed 2d 925, the Tenth Circuit sustained the conviction of the defendant who had given an F.D.A. agent nembutol capsules on the sole ground that while the defendant thought himself a competent doctor, he was not. In fact he

was not a licensed physician, but a charlatan. In addition, the Seventh Circuit, in **United States v. 2600 State Stores,** 235 Fed 2d 913, considered the complaint of a druggist convicted under the Section for making a sale without a prescription. The Court held:

> "Another factor which we must consider in the instant case is the fact that the provisions of the Sections of the Act hereunder consideration were to bind **pharmacists** and to subject them to penalties in case of violations."

In the only reported District Court case, **United States v. 10 Cartons,** 152 Fed Supl 360, the Court stated that licensed practitioners were exempt from the Act in these words:

> "Footnote (6). When Congress intended to exempt licensed practitioners from the operation of the Act it spoke plainly enough. See Section 503(b)(2), 21 U.S.C.A., Section 353(b)(2)."

On the other hand, Justice Whittaker, while a District Judge, held the Act did not exempt licensed practitioners. No opinion was written in that case, but a transcript of the Court's sentencing remarks on a plea of nolo contendere was filed in the Court below.

3. The petition should be granted because the Court of Appeals has decided a Federal question in a way in conflict with decisions of the Supreme Court. Prior to its amendment in 1951, the Pure Food and Drug

Act did not regulate physicians' prescriptions. Following Justice McReynolds' statement

> "Obviously direct control of medical practice in the States is beyond the power of the Federal Government."

in **Linder v. United States,** 69 Lawyer's Ed. 819, the Ninth Circuit, in **Schlessing v. United States,** 239 Fed 2d 885, stated:

> "The practice of medicine is * * * regulated by the legislature and administrative boards of the State * * * it is a mooted question whether a chiropractor can use such a device, but it is one for the courts and agencies of California to regulate. The agency (F.D.A.) has no jurisdiction or authority to attempt to regulate the practice of medicine * * *."

Nothing in the 1951 amendment adds to the provisions to make the Act applicable to physicians, and the enlargement insisted upon by the Government and made by the Court below is judicial only. This Court stated in **Pierre v. United States,** 314 U.S. 306, 86 Law. Ed. 226:

> "A comparable judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."

Section 353(b)(1) recognizes his right to give a prescription and apparently exempts a physician from

compliance with the Pure Food and Drug Act as did the predecessor to that Section. This Court, in considering the inspection requirement of the Pure Food and Drug Act, stated in **United States v. Cardiff,** 340 U.S. 174, 97 Law .Ed. 200, 73 Supreme Court 189:

> "However we read Section 301(f), we think it is not fair warning to the factory manager that if he fails to give consent, he is a criminal. The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited • • • We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold."

In **United States v. 2600 State Stores,** 235 Fed 2d 913, the Seventh Circuit considered the complaint of a druggist convicted under Section 353(b)(1) for making a sale without a prescription. The druggist asserted that the statute was so vague, uncertain, and indefinite in defining his conduct as a crime as to fall short of the due process requirement. That contention was rejected as to the pharmacist but solely on the ground that the amendment was adopted for the purpose of regulating pharmacists, and we submit that the Court of Appeals' decision below extending the amendment to physicians is repugnant to the due process clause of the Fourteenth Amendment.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE S. MCCARTHY,

Fisk Building,
Amarillo, Texas,
Attorney for Petitioner.

BEN MONNING, JR.,
1016 Fisk Building,
Amarillo, Texas,
Of Counsel.

APPENDIX

(January 3, 1958.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from the conviction of a physician for the violation of provisions of the Food, Drug and Cosmetic Act that prohibits the **dispensing** of certain potentially harmful drugs, transported in interstate commerce, without a **prescription.**

The evidence fully warranted the jury's finding that the appellant, a practicing physician in Dumas, Texas, sold to two Federal agents, whom he supposed to be truck drivers, three separate lots of dextro-amphetamine hydrochlorine tablets[1] that had been shipped in interstate commerce; that prior to dispensing them Dr. Brown had not prepared or given them any prescription and had not physically examined either of them and had not questioned them or "prescribed" a dosage or otherwise attempted to acquaint himself with either the physical condition or needs of either man.

The statute under which the three-count indictment was brought makes illegal and punishable as for a misdemeanor, under circumstances here present, a

---

[1] The testimony, denied by the accused, was to the effect that the agent Spivak obtained 1000 5-mg. tablets on March 10th, 1000 10-mg. tablets on March 22nd, and that, in the presence of Spivak, another agent, Keeting, received 1000 5-mg. tablets on March 23rd.

violation of the following provisions of 21 U.S.C.A. §353(b)(1):

> "A drug intended for use by man which . . .
>
> (B) Because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such a drug;
>
> . . . .
>
> shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale."
>
> 21 U.S.C.A. §353(b)(2).

Although the appellant denies the sales, implying that the transactions with the two agents were of quite a different nature, he makes no contention that there was not sufficient evidence to sustain the conviction if the terms of this statute reach a regularly licensed physician who sells these covered drugs under the circumstances outlined. The burden of his defense is that the provisions of the Act do not apply to the act of dispensing drugs by a licensed physician.

No decided case in which an appellate court has

precisely held this law applicable to the conduct of a regularly licensed physician has been called to our attention. The Court of Appeals for the Tenth Circuit affirmed a conviction of one who held himself out to be a doctor, but who had not obtained a medical license in **Archambaut v. United States**, 10 Cir., 224 F. 2d 925. The District Court for the Western District of Missouri construed the law as here contended for by the United States where it entered a judgment of conviction on a plea of nolo contendere against a doctor who dispensed pills of the prescribed type without an examination or prescription. In sentencing the prisoner, the district judge, now Supreme Court Justice Whittaker, said:

> "Your error lies in the fact that, having a license to practice medicine, you have assumed that it was a license to peddle pills, and that is not the law. People came to you, Doctor, and without an examination or any prescription, just ordered pills and you would ask them, 'Do you want the red or the yellow?'—and you just handed out the pills, these barbiturates and sex harmones, without any examination or prescription. You did that to those Government agents who came in there, not once but half a dozen times.
>
> "Now, there seems to be some concept among the members of the medical profession that to have a license to deal in medicine carries a license to deal in barbiturates. That is not the law. The medical profession might just as well understand it. If I come to you for treatment and you, in your medical capacity examine me, and after examination determine that certain barbiturates would be beneficial to me, then you have a right

> to write a prescription to me, and then I have a right to get them and use them, but not otherwise."
> **United States v. Amin Boutros,** (D.C.W.D. Mo.) No. 19,304-Cr. Decided Dec. 23, 1955.

The language of the statute, considered alone, is certainly broad enough to make criminal what was done here. It says expressly that these pills "shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such . . . . ." The 3000 tablets were acquired by the "purchasers," who were not "patients," without either a written or oral prescription, no matter how broadly the word "prescription" is to be construed.

Appellant argues only that although the language is broad enough to include physicians, the statute must be interpreted differently and for this proposition he refers to the discussion in the legislative history of the apparent purpose to make the requirements applicable to "druggists." But we do not need to refer to the legislative history of this particular act to construe the statute. The Supreme Court has on several occasions held that the purpose of the legislation is the protection of the people from dangerous products which are shipped in interstate commerce. **United States v. Dotterweich,** 320 U.S. 277; **United States v. Sullivan,** 332 U.S. 689. Further the Court, in the Sullivan case, said:

> " . . . there is no canon against using common sense in reading a criminal law, so that strained and technical constructions do not defeat its purpose by creating exceptions from or loopholes in it." 332 U.S. 689, 693.

Moreover, the Supreme Court has also construed the word "prescription" as used in other related Federal legislation. Recognizing, as we do, that under the Harrison Narcotic Act, the question of good faith treatment of patients may be involved, nevertheless we find, in a Harrison Act case, pertinent language describing a "prescription." The Court answered a certified question from the Court of Appeals for the Sixth Circuit:

> "3. If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of '2?"
>
> **Webb v. United States,** 249 U.S. 96, 99.

The answer, obvious it seems to any who consider the matter, was:

> "As to question three—to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required. That question should be answered in the negative."
>
> **Webb v. United States,** 249 U.S. 96, 100.

What was there said by the Supreme Court an-

swers, we think, appellant's objection to the court's charge that the jury might properly consider whether a doctor-patient relationship existed.[2] The inquiry whether there was a bona fide relationship of patient and doctor bears on the question whether there had ever been a "prescription" for the agents. The court thus broadened the term to something more than written paper, which really benefitted the accused. The jury, under this charge, could have found that Dr. Brown "prescribed" for the men if the jury had found the existence of a doctor-patient relationship which appellant testified vaguely did exist, at least as to two of the sales. There was no error in submitting this issue to the jury.

We conclude that the jury had ample grounds for finding that Dr. Brown dispensed the tablets without prescription and we find that such action is prohibited under the law, even when done by a regularly licensed physician.

The judgment is AFFIRMED.

---

2 The charge was:

"If you find that the defendant did dispense the original contents of Government Exhibits 1, 2 and 3, two of them to the Government witness Spivak, and the other to the Government witness Keeting, then in determining whether he dispensed the drugs thereon on prescription, you may properly consider whether a doctor-patient relationship existed between the defendant and the person to whom you find he sold the bottle of drug in each instance, whether he considered the individual needs of the person to whom he dispensed the drug, the quantity of the drug dispensed and the manner in which he supervised the use of the drug. The fact that the defendant is a physician licensed under the laws of Texas does not exempt him from responsibility for any violation of the terms of the Federal law in question."

ORDER DENYING REHEARING

Extract from the Minutes of February 8, 1958

THOMAS GUY BROWN,

No. 16,536 *v.*

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
APR 4 1958
JOHN T. FEY, Clerk

No. 846

In the Supreme Court of the United States

OCTOBER TERM, 1957

THOMAS GUY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM ANDERSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	3
Argument	6
Conclusion	9

CITATIONS

Cases:

Archambault v. *United States*, 224 F. 2d 925	9
Jin Fuey Moy v. *United States*, 254 U.S. 189	8
United States v. *Dotterweich*, 320 U.S. 277	7
United States v. *Sullivan*, 332 U.S. 689	7
United States v. *10 Cartons, etc.*, 152 F. Supp. 360	8
United States v. *2600 State Drugs*, 235 F. 2d 913, certiorari denied, 352 U.S. 848	9
Webb v. *United States*, 249 U.S. 96	8

Statutes:

Federal Food, Drug, and Cosmetic Act	
Section 301, as amended, 62 Stat. 582 (21 U.S.C. 331)	3, 4
Section 303, 52 Stat. 1043 (21 U.S.C. 333)	3
Section 503, 65 Stat. 648 (21 U.S.C. 353)	1, 2, 4, 6, 7

Miscellaneous:

H. Rep. No. 700, 82d Cong., 1st Sess., pp. 2, 7	7
Sen. Rep. No. 946, 82d Cong., 1st Sess., pp. 3, 4	7
Webster's *New International Dictionary*, Second Edition	8

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 846

THOMAS GUY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 183-189; Pet. App. 15-20) is reported at 250 F. 2d 745.

JURISDICTION

The judgment of the Court of Appeals was entered on January 3, 1958 (R. 190). A petition for rehearing was denied on February 8, 1958 (R. 191-195; Pet. App. 21). The petition for a writ of certiorari was filed on March 10, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 503(b)(1) of the Federal Food, Drug, and Cosmetic Act proscribes sales by a licensed

physician of large amounts of dangerous amphetamine drugs to persons who are not his patients, without physical examination of the purchasers, prescriptions, or supervision of use of the drugs.

STATUTES INVOLVED

Provisions of the Federal Food, Drug, and Cosmetic Act are as follows:

Section 503, 65 Stat. 648 (21 U.S.C. 353):

* * * * *

(b)(1) A drug intended for use by man which—

(A) is a habit-forming drug to which section 502(d) applies; or

(B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or

(C) is limited by an effective application under section 505 to use under the professional supervision of a practitioner licensed by law to administer such drug,

shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dis-

pensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

* * * *

Section 301, as amended, 62 Stat. 582 (21 U.S.C. 331):

The following acts and the causing thereof are prohibited:

* * * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

* * * *

Section 303, 52 Stat. 1043 (21 U.S.C. 333):

(a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine or not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

* * * *

STATEMENT

Petitioner was charged in a three-count indictment (R. 10-12) in the United States District Court for

the Northern District of Texas with dispensing certain potentially harmful drugs, transported in interstate commerce, without a prescription from a licensed practitioner, contrary to the provisions of Sections 503(b)(1) (21 U.S.C. 353 (b)(1)) and 301 (k) (21 U.S.C. 331 (k)) of the Federal Food, Drug, and Cosmetic Act (*supra*, pp. 2, 3). The jury found him guilty on all three counts. He was sentenced to imprisonment for five months under count one, and a $500 fine under count two. The imposition of imprisonment was suspended under counts two and three, with probation for four years (R. 23-24). On appeal, the judgment was unanimously affirmed (R. 26-27, 190).

The pertinent evidence adduced at the trial may be summarized as follows:

On March 2, 1956, one Spivak, an inspector for the Food and Drug Administration, posing as a truck driver, went to the office of petitioner, a licensed physician in Dumas, Texas, and obtained from him a prescription for 50 dexedrine tablets. Petitioner did not give Spivak a physical examination or ask the purpose for which he intended to use the tablets (R. 31-32). A few days later, again without a physical examination, Spivak obtained another prescription for 100 dexedrine tablets, and petitioner gave him a quantity of dextro-amphetamine-hydrochloride tablets to sample (R. 32-35).

On March 10, 1956 (count 1), Spivak told petitioner that he wanted some more of the amphetamine tablets which petitioner had given him to sample. Petitioner sold Spivak a bottle of 1000, 5 milligram

tablets of dextro-amphetamine-hydrochloride, manufactured by Lustgarten Laboratories, Philadelphia, for $10 (R. 3, 35-36). Petitioner did not write a prescription, and made no physical examination of Spivak nor did he tell him how he should take the tablets (R. 3-4, 37).

On March 22, 1956 (count 2), Spivak asked for another bottle, and petitioner sold to him 1000, 10 milligram dextro-amphetamine-sulphate tablets, manufactured by Richlyn Laboratories, Philadelphia, for $15 (R. 4, 39-40, 42). Petitioner did not write a prescription, nor did he give Spivak a physical examination or tell him how he should take the tablets (R. 4, 41).

On March 23, 1956 (count 3), Spivak returned to petitioner's office with an inspector named Keating. Spivak introduced Keating as another truck driver interested in obtaining amphetamine tablets. After Spivak vouched for Keating as a friend, petitioner sold Keating 1000, 5 milligram dextro-amphetamine-hydrochloride tablets for $10 (R. 4, 42-43, 46-51). Petitioner did not write a prescription, nor did he give Keating a physical examination or tell him how he should take the tablets (R. 4-5, 45, 52).

The prosecution introduced expert medical testimony as to the nature of the amphetamine drugs involved. In the underworld they are known under various names such as "bennies", "pep pills", and "goof balls" (R. 56-57). These drugs, because of their capacity for harmful effects, should be taken only after a proper physical examination and under medical supervision (R. 5, 61-62, 68-70). The sale of 1000 tablets at one time would not constitute medical

practice, but rather a "Wholesale drug business" (R. 5, 70). Unsupervised use of these drugs may cause blood vessels to break, adverse effects on the heart, convulsions, and even death (R. 5-6, 59-60, 63-64). The use of amphetamine drugs by truck drivers causes them to over-extend themselves and forego rest, thereby losing control over their nervous reactions (R. 6). These drugs may also cause resort to other drugs, such as barbiturates, to counteract effects of the amphetamines, thus resulting in a "vicious cycle" (R. 76-77).

Petitioner, testifying on his own behalf, denied the sales upon which his conviction was based (R. 7, 119, 142-143). Petitioner testified that on several occasions he took Spivak's blood pressure by testing his pulse (R. 103, 105, 132-133). Petitioner stated that he knew of no ill effects to his patients or to himself from use of these drugs (R. 130-131), and that he had never dispensed more than 500 of the amphetamine tablets at a time (R. 7, 147-148). In rebuttal, one Speegle testified that he had purchased amphetamines from petitioner in quantities of 1000 tablets or more at a time (R. 7-8, 164-166).

ARGUMENT

The thrust of petitioner's argument is that Section 503(b)(1) of the Federal Food, Drug, and Cosmetic Act (*supra*, pp. 2-3) is not broad enough to proscribe sales by a licensed physician of large amounts of dangerous amphetamine drugs without physical examinations of the purchasers, written prescriptions, and supervision of the manner in which the drugs are to be used.

Section 503(b)(1), however, does not single out any particular class and provide, for instance, that druggists shall not dispense harmful drugs, or that physicians shall not dispense them. Rather, it provides that the drugs "shall be dispensed [not saying by whom] only" upon prescription of a practitioner licensed by law to administer them. Anyone dispensing the drugs in a manner other than that provided by the statute—and this would include druggists, licensed physicians, and ordinary narcotics "pushers" —is a violator subject to conviction.

Petitioner's contention that this statute covers only druggists, and not physicians, is without merit. The over-all purpose of the Act is to protect the public from dangerous products (as the amphetamine drugs admittedly were) "from the moment of their introduction into interstate commerce all the way to the moment of their delivery to the ultimate consumer." *United States* v. *Sullivan*, 332 U.S. 689, 696; *United States* v. *Dotterweich*, 320 U.S. 277, 282. A similar purpose to protect the consuming public is evinced by congressional reports accompanying the bill which resulted in the 1951 amendment embraced in Section 503(b)(1) of the Act. See H. Rep. No. 700, 82d Cong., 1st Sess., pp. 2, 7; Sen. Rep. No. 946, 82d Cong., 1st Sess., pp. 3, 4.[1] In order to make

---

[1] Sen. Rep. No. 946, 82d Cong., 1st Sess., p. 4, in speaking of the definition of dangerous drugs contained in paragraph (b)(1)(B) of the bill which became Section 503 of the Act, states: "When this language is given judicial interpretation consistent with the over-all purpose of the Federal Food, Drug, and Cosmetic Act to protect the public health it will effectively restrict to prescription sale all drugs that require professional supervision for their use."

effective this salutary purpose, it is both necessary, and entirely reasonable, to construe the statute as applicable to all violators endangering the safety of the public. Neither the statute itself nor its legislative history is susceptible of the conclusion that it covers only illegal dispensation of harmful drugs by druggists.

The mere order of a physician for a drug, unless it is used for a legitimate medical purpose, is not a prescription in the accepted sense of the word.[2] Cf. *Webb* v. *United States*, 249 U.S. 96; *Jin Fuey Moy* v. *United States*, 254 U.S. 189. Here petitioner did not even purport to prescribe. He dispensed the harmful drugs in wholesale quantities without written or oral prescriptions, and without professional supervision as required by the statute. The possible result was indiscriminate and unguided use of potentially harmful drugs by purchasers, deprived of the safeguards to their health, which the statute was designed to guarantee. The statute does not regulate the practice of medicine. As applied here, it merely provides that if a physician acts not as a physician but as an ordinary seller, and dispenses harmful drugs in a manner other than that provided by the statute, he is subject to prosecution. Cf. *United States* v. *10 Cartons, etc.*, 152 F. Supp. 360, 364-365 (W.D. Pa.).

This is not a case of an accused unable to determine, by reason of vagueness or uncertainty, whether

---

[2] "Prescription" is defined in Webster's *New International Dictionary*, Second Edition, as follows: "A written direction for the preparation and use of a medicine; a medical recipe; also, a prescribed remedy."

the statute applies to his conduct. The jury could reasonably infer that petitioner was well aware that he was violating the law. Thus, when he made the sales, petitioner informed Spivak and Keating that in order not to make a "racket of it" he sold only to "a few friends" and asked Spivak to "vouch" for Keating (R. 43, 48-49, 4).[3]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

APRIL 1958.

---

[3] Cases cited by petitioner are not in conflict with the decision below. In *Archambault* v. *United States*, 224 F. 2d 925 (C.A. 10) (Pet. 10), although the illegal sales without prescriptions were made by a person not a licensed physician, there was no holding that, if he had been a physician, he would have been exempt from provisions of the Act. In *United States* v. *2600 State Drugs*, 235 F. 2d 913 (C.A. 7), certiorari denied, 352 U.S. 848 (Pet. 11, 13), although the statute was held applicable to illegal sales without prescriptions by druggists (with which we agree), there was no holding that the statute applied to druggists exclusively. Neither of these cases is at variance with the position that Section 503(b)(1) applies to all persons who dispense harmful drugs in violation of its provisions.

☆ U. S. GOVERNMENT PRINTING OFFICE 1958 460228 1260

LIBRARY
SUPREME COURT, U. S.

MOTION FILED JUN 9 1958

In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 846

THOMAS GUY BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR RE-HEARING

GEORGE S. McCARTHY,
Fisk Building,
Amarillo, Texas,
Attorney for Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR RE-HEARING

Petitioner moves the Court to grant leave to file Petition for Re-Hearing herein, and for cause would show:

On May 22, 1958, Petitioner mailed to the Clerk of the Supreme Court by air mail forty (40) copies of the attached Motion for Re-Hearing. The Petition was properly addressed and postage paid. The established air mail schedule, the advice of local postal authorities, and prior experience assured Petitioner that the Petition for Re-Hearing would arrive in Washington the following morning and be delivered on May 23, 1958, the 25th day for filing the Petition. However, a delay in the United States mail caused the Petition to be delivered to the Clerk on the 24th day of May.

WHEREFORE, Petitioner prays the Court grant him leave to file the following Petition for Re-Hearing of Order Denying Petition for Writ of Certiorari.

Respectfully submitted,

GEORGE S. MCCARTHY,
Fisk Building,
Amarillo, Texas,
Attorney for Petitioner.

BEN MONNING, JR.
1016 Fisk Building,
Amarillo, Texas.
Of Counsel

In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 846

THOMAS GUY BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR RE-HEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

GEORGE S. McCARTHY,
Fisk Building,
Amarillo, Texas,
Attorney for Petitioner.

AMARILLO BRIEF CO. P. O. BOX 1656 AMARILLO, TEXAS

In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 846

THOMAS GUY BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR RE-HEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant re-hearing of its order of April 28, 1958, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case, as prayed for in the petition filed on March 10, 1958, herein.

REASONS FOR GRANTING THE RE-HEARING AND ISSUING THE WRIT

Section 353(b)(1) provides that prescription drugs

> "shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, (ii) upon an oral prescription by such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription, if such refilling is authorized by the prescriber, . . . The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale."

No provision is made in the statute excepting or exempting the act of a licensed physician who dispenses without (i) a written prescription or (ii) an oral prescription later reduced to writing and filed by the pharmacist. Thus, if the section prohibits the act of petitioner in dispensing the drugs, then the Act also prohibits the dispensing of drugs in any quantity by any physician who does not comply with one of the three requirements. The Government contends that each such act of a physician constitutes a violation of the provision. The petitioner, who stands convicted of dispensing 1,000 tablets on three separate occasions, insists the statute is not applicable to the act of a licensed physician. In addition to the **Archambault** case, 224 Fed 2d 925, and **U. S. v. Ten Cartons,** 152 Fed Supl 360, considered by the Court in the petition, petitioner respectfully calls the attention of this Court to the fact that it denied petition for certiorari in **United States v. 2600 State Stores,** 235 Fed 2d 913, in which the Court of Appeals for the Seventh Circuit stated,

> "Another factor which we must consider in the instant case is the fact that the provisions of

> the sections of the Act here under consideration were to bind pharmacists and to subject them to penalties in case of violation."

By the denial petitioner insists that this Court has already approved the holding that the Act of October 26, 1951, the very section involved in this action, has already been interpreted to apply only to pharmacists, and that interpretation has the approval of this Court.

Petitioner failed to call to the attention of this Court the following rule of law applicable to the section here involved:

> "The Legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct, and know what act it is his duty to avoid. . . . If a statute uses words of no determinative meaning and the language is so general and indefinite as to embrace not only acts properly and legally punishable, but others not punishable, it will be declared void for uncertainty. It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. Purely statutory offenses cannot be established by implication. There can be no constructive offenses. Before a man can be punished, his case must be plainly and unmistakably within a statute. A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks

the first essential of due process of law." 14 Am Jur 773.

Petitioner does not contend that the handling of 3,000 tablets, as found by the jury was not wrong. Petitioner does, however, re-urge that a licensed physician's act of administering or dispensing prescription drugs without compliance with sub-sections (i), (ii) and (iii) is permitted by Section 353(b)(1) of the Pure Food and Drug Act.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that re-hearing be granted and that, upon such re-hearing, a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

GEORGE S. MCCARTHY,

Fisk Building,
Amarillo, Texas,
Attorney for Petitioner.

BEN MONNING, JR.
1016 Fisk Building,
Amarillo, Texas.
Of Counsel

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Re-Hearing is presented in good faith, and not for delay, and is restricted to grounds specified in Rule 33 of the Rules of this Court.

.....

GEORGE S. MCCARTHY